Dec 9. 1872 63-320
Colored Cases

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~329~~ ~~320~~ 6 8 4

RICHARD C. KIMBALL, GEORGE S. SHORB, AND W'M C. KIMBALL, PLAINTIFFS IN ERROR,

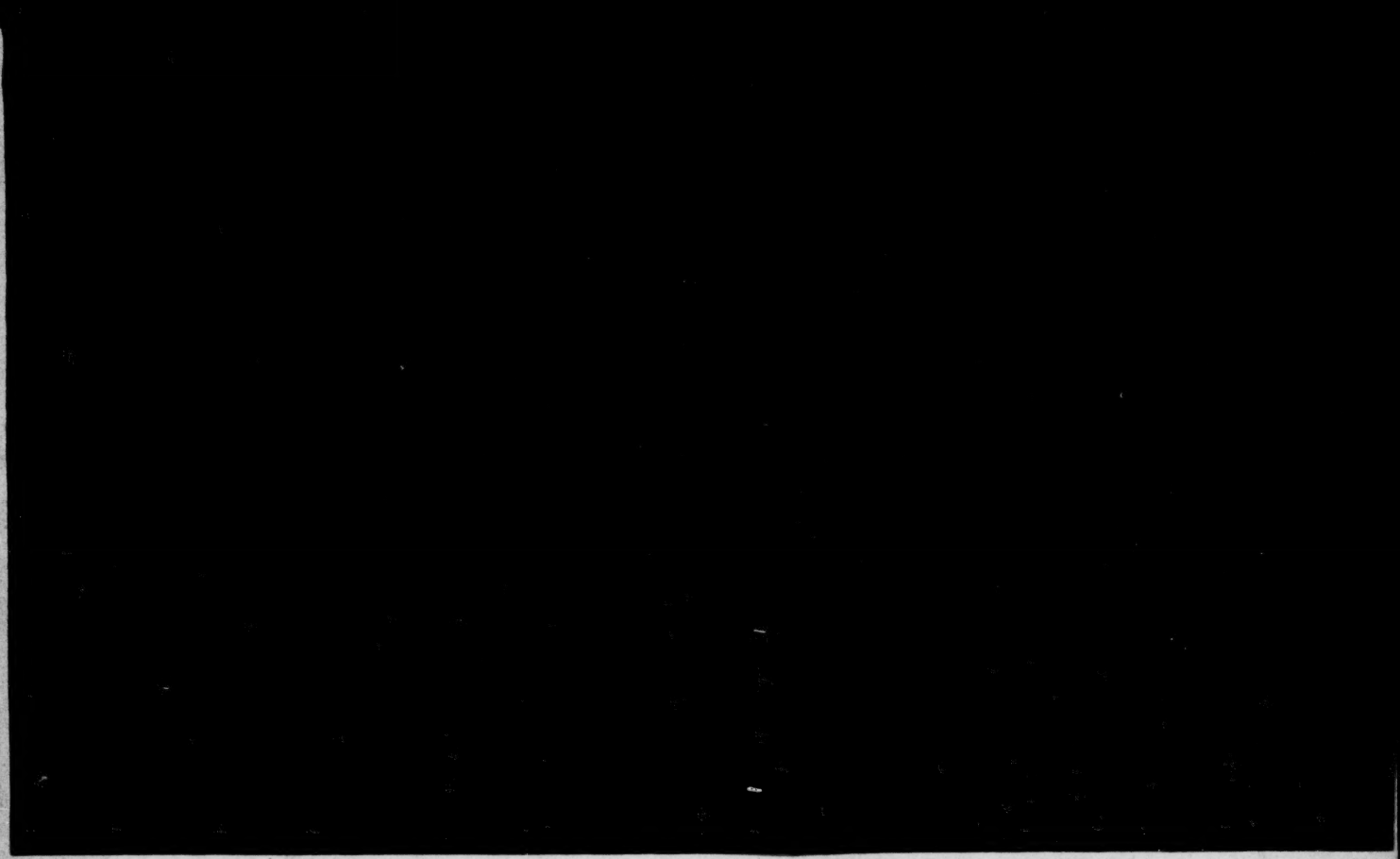
vs.

WILLIAM F. EVANS, ELIJAH P. GRANT, JOSEPH C. RICHARDS, JACOB MILLER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JANUARY 9, 1872.

Dec 9 1872
Dismissed
Clerk Fee



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1 THE STATE OF OHIO, *ss:*

At a term of the supreme court of the State of Ohio, begun and held in the court-room of the capitol, in the city of Columbus, before the Honorable Jacob Brinkerhoff, chief justice, Hon. Josiah Scott, Hon. John Welch, Hon. W'm White, and Hon. Luther Day, judges of said court, on the fifth day of December, in the year of our Lord one thousand eight hundred and seventy, among the other proceedings then and there had were the following, to wit:

W'M F. EVANS AND OTHERS
v.
RICHARD C. KIMBALL AND OTHERS. } Appeal. Reserved in the district court of Starke County.

Be it remembered that, heretofore, to wit, on the ninth day of January, in the year of our Lord one thousand eight hundred and sixty-nine, the said defendants, Richard C. Kimball and others, by their attorneys, filed in the office of the clerk of our said supreme court here, a duly-certified transcript of the journal-entries including the certificate of reservation to this court from the district court of Starke County; which transcript and certificate are in the words and figures following, to wit:

Transcript of journal-entries.

At a term of the district court of the State of Ohio, begun and held at the court-house in the city of Canton, within and for the county of Stark, on Saturday, the eighteenth day of April, in the year A.
2 D. eighteen hundred and sixty-eight—present Hon. Jacob Brinkerhoff, Hon. N. L. Chaffee, Hon. Joseph Frease, judges; R. A. Dunbar, sheriff; A. W. Heldenbrand, clerk—in the record and proceedings of said court, then and there held, among other things is the following, to wit:

W'M F. EVANS ET AL.
v.
ROBERT C. KIMBALL ET AL. } Appeal.

In this cause the said Richard C. Kimball, George F. Shorb, and William C. Kimball, defendants, having filed their petition to remove this cause to the district court of the United States for the northern district of Ohio, under the act of Congress approved March 2nd, A. D. 1867, and the said Richard C. Kimball, George F. Shorb, and William C. Kimball, having in support of their said petition made and filed their own affidavit and the of George E. Baldwin, one of their attorneys, and having also offered and tendered good and sufficient sureties for their entering in said circuit court of the United States for the northern district of Ohio, on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other acts as by the act of Congress of the United States, entitled "An act for the removal of causes in certain cases from State courts," approved July 27th, eighteen hundred and sixty-six, are required to be done upon the removal of a suit
3 into the United States court. And therefore, the said cause came on for hearing upon said petition, supported by said affidavits, and was argued by counsel; upon consideration whereof difficult and important questions were found to arise.

Order of reservation.

Whereupon, on motion of the said Richard C. Kimball, George F. Shorb, and William C. Kimball, it is ordered that this cause be reserved and sent to the Supreme Court for its decision on said petition for the removal of the cause to said circuit court; and that the said petition and affidavits be sent up to said Supreme Court for the purpose of the decision of said motion.

THE STATE OF OHIO,
Stark Co., ss:

I, A. W. Heldenbrand, clerk of the district court of the aforesaid county, do hereby certify the foregoing to be a true copy and correctly taken from the journal of our said district court.

Witness my signature and the seal of said court, at Canton, this eighth day of January, eighteen hundred and sixty-nine.

[SEAL.] A. W. HELDENBRAND, *Clerk.*

And along with said transcript and certificate there were filed the following original papers, to wit:

Original petition and exhibit filed in common pleas, October 7th, 1865.

4 THE STATE OF OHIO, *Stark County, ss:*

Court of common pleas in and for said county of Stark.

WILLIAM F. EVANS, ELIJAH P. GRANT, JOSEPH C. Richards, Jacob Miller, George Cook, Jacob Baier, James G. Webster, James B. Estep, Ep'raim Ball, Augustus M. Burke, Lewis Miller, David Zellars, Alexander Hurford, John M. Faber, Edward W. I. Lindensmith, Martin Deuble, and George D'uble, plaintiffs, *vs.* RICHARD C. KIMBALL, GEORGE S. SHORB, William Kimball, Conrad Schweitzer, Cornelius Aultman, Isaac Haster, Daniel B. Whitacre, Uriah R. Feather, James W. Underhill, John F. Raynolds, and Joseph Saxton, defendants.	Civil action. Petition.

Petition.

The plaintiffs, William F. Evans, Elijah P. Grant, Joseph C. Richards, Jacob Miller, George Cook, Jacob H. Bair, James G. Webster, James B. Estep, Ephraim Ball, Augustus M. Burke, Lewis Miller, David Zellars, Alexander Hurford, John M. Faber, Edward W. I. Lindensmith, Martin Deuble, and George Deuble, of said county of Stark, complain and say that on or about the 22nd day of March, A. D. 1865, the defendant Richard C. Kimball, of said county of Stark, represented to the plaintiffs and to the defendants, Cornelius Aultman, Isaac Haster, Dan'el B. Whitacre, Uriah R. Feather,
5 James W. Underhill, John F. Raynolds, and Joseph Saxton, that he had good reason to believe, and it was certain, that petroleum

or coal-oil, in large quantity was contained on, and could be obtained from, certain lands situate in the county of Washington, in the State of Ohio, which lands are more particularly described in the agreement, a copy of which is hereto attached, marked A, and made part of this petition; that he could purchase the first two tracts of land mentioned in said agreement and obtain leases of the other tracts of land therein mentioned for the sum of twenty-two thousand dollars, and requested and solicited the plaintiffs, and said last-mentioned defendants to unite with him in purchasing and leasing said lands with the intention of afterwards joining together, and with others that might join them, an incorporated company for the purpose of developing the subter'anean wealth of said lands by boring for oil or other mineral or volatile substances as they might deem best. The plaintiffs further say that neither the said plaintiffs, nor any of said last-named defendants has ever seen any of the aforesaid lands, which are situate at a remote distance from the place of their residence, and they had no knowledge whatever concerning said lands or their value, except what they gathered from the representations aforesaid of said Richard C. Kimball, who had lately visited said county of Washington, and been on and examined said lands and so represented; that they relied wholly upon the aforesaid representations of said Richard C. Kimball, and believed them to be true, and that, relying upon said representations, and induced
6 thereby, the plaintiffs and said last-named defendants agreed to unite with said Richard C. Kimball in purchasing and leasing said lands, and for the purpose of affecting said objects and raising a fund to be placed in the hands of said Richard C. Kimball, as a trustee and agent for the parties to said agreement, and with which to purchase and lease said lands for said parties, the plaintiffs and said defendants signed said agreement, which was drawn up in accordance with the directions of said Richard C. Kimball, and was signed by him, and also by the defendants Conrad Schweitzer and George S. Shorb and William Kimball, the two latter of whom, by the name of Shorb and Kimball, the plaintiffs subscribing thereby the following sums to wit: William F. Evans, one thousand dollars; Elijah P. Grant, five hundred dollars; Joseph C. Richards, five hundred dollars; Jacob Miller, two thousand dollars; George Cook, one thousand dollars; Jacob H. Bair, five hundred dollars; James G. Webster, one thousand dollars; James B. Esty, one thousand dollars; Ephraim Ball, one thousand dollars; Augustus M. Burke, one thousand dollars; Lewis Miller, two thousand dollars; David Zellers, five hundred dollars; Alexander Hurford, five hundred dollars; John M. Faber, five hundred dollars; Edward W. I. Lindensmith, five hundred dollars; and Martin Duble and George Duble, who signed said agreement under the name of Deuble Bros., together, one thousand dollars; and the defendants subscribing thereby the following sums to wit: Cornelius Aultman, two thousand dollars; Isaac Haster, one thousand dollars; Daniel B. Whitacre, five hundred dollars; Uriah R. Feather, one thousand dollars; James W. Underhill, five hundred dollars; John F. Raynolds and Joseph Saxton, who signed by the name of Raynolds and Saxton, one thousand dollars;
7 Conrad Schweitzer, one thousand dollars; George S. Shorb and William Kimball, who signed by the name of Shorb and Kimball, one thousand dollars, and Richard C. Kimball, one thousand dollars.

The plaintiffs further say that on or about the 22nd day of March, 1865, the plaintiffs and the defendants Cornel'us Aultman, Isaac Haster, Daniel B. Whitacre, Uriah R. Feather, James W. Underhill, and John F. Raynolds, and Joseph Saxton, paid to said Richard C. Kimball

the aforesaid sums subscribed by them in said agreement, amounting, in the aggregate, to the sum of twenty thousand and five hundred dollars, in trust as aforesaid, and for the purposes aforesaid.

The plaintiffs further say that all the representations made by said Richard C. Kimball, as aforesaid, were false and fraudulent, as he well knew when so making them; that he had no reason to believe, and did not in fact believe, and it was not certain that petroleum (coal oil) in large quantity, or any quantity, was contained on, and could be obtained from said lands; that he well knew that said lands could be purchased and leased as aforesaid for a much less sum than twenty-two thousand dollars; and that he actually did purchase and lease said lands for a sum much less than that amount. The plaintiffs say that said lands are not, in fact, worth more than the sum of fifteen hundred dollars, as said Richard C. Kimball then well knew, and, in fact, said lands are of no value whatever for the purposes aforesaid, and intended. And so the plaintiffs say that they, said plaintiffs and the defendants last named, who paid their subscription, as aforesaid, were deceived and defrauded, and induced by said faulse and fraudulent representations made by said Richard C. Kimball,
as aforesaid, to place said sum of money into his hands, in trust as
8 aforesaid, and cheated and defrauded out of said money and to
the extent thereof.

The plaintiffs further say that after paying said sum of money and discovering the fraud, they have often requested said Richard C. Kimball to inform them what amount he actually paid as the consideration for the lands purchased and leased by him, as aforesaid, and to account for the money placed in his hands, as trustee as aforesaid, which he, the said Richard C. Kimball, had always refused and still refuses to do, for which reason the plaintiffs are unable to state the precise sum paid by him, as aforesaid, but the plaintiffs believe and therefore aver that the amount so paid was less than six thousand dollars, and that the balance of said sum of twenty thousand and five hundred dollars was, by said Richard C. Kimball, fraudulently converted to the use of himself and of the said George S. Shorb and William Kimball, his confederates, who aided and assisted him in perpetrating said fraud. And the plaintiffs say that because the said Cornelius Aultman, Isaac Haster, Daniel B. Whitacre, Uriah R. Feather, James W. Underhill, John F. Reynolds, Joseph Saxton, and Conrad Schweitzer would not consent to be joined in this petition and action as plaintiffs, they are made defendants in this petition.

Whereupon the plaintiffs ask for a judgment or order, that the said Richard C. Kimball account for the money received by him, as aforesaid, and required to pay the plaintiffs, and such of said defendants as, with them, may be entitled to the same, the said sum of twenty thousand and five hundred dollars, and interest thereon from the 22nd of March, 1865,
or to the plaintiffs the amount so by them paid, to wit, fourteen
9 thousand and five hundred dollars, and interest thereon from
the 22nd day of March 1865. And they also ask that said defendants George S. Shorb and William Kimball, be ordered and adjudged to account for the money received by them as aforesaid, and required to pay the same over in the same manner and proportion. And the plaintiffs ask such other and further relief in the premises as equity and justice may require, and as may be deemed right and proper.

S. W. McCLURE,
UPSON AND BERNARD,
MEYER AND MANDERSON,
Attorneys for Plaintiffs.

THE STATE OF OHIO, *Stark County, ss:*

Elijah P. Grant makes oath and says that he is one of the plaintiffs named in the above petition, and that the statements contained in said petition are true, as he verily believes.

E. P. GRANT.

Sworn to before me and signed in my presence this fifth day of October, 1865.

[SEAL.] SERAPHUS MEYER,
Notary Public in and for said County.

Precipe.

Issue a summons returnable according to law. Amount claimed from defendant Richard C. Kimball, $20,500.00, and interest thereon from March 22nd, 1865.

October 6th, 1865.

S. W. McCLURE,
UPSON AND BERNARD,
MEYER AND MANDERSON,
Att'ys for Plaintiffs.

CLERK COM PLEAS, STARK CO., O.

10 EXHIBIT A.—*Copy of agreement.*

Copy of agreement mentioned in the petition.

We, the undersigned, agree to pay to R. C. Kimball, or order, on demand, the amount set opposite each of our names for the purpose of purchasing the following described lands and leases of lands, for the purpose of forming ourselves into an incorporated company, for the purpose of developing said lands and leases by boring for oil or other mineral or volatile substances, as we may think best. Said lands and leases are as follows:

One tract of about sixty-five (65) acres in fee-simple, situate near Paw-Paw Creek.

One tract of about fifty-one (51) acres in fee-simple, situate on Coal Run near Paw-Paw Creek.

Lease for about seven (7) years of about seventy-five (75) square feet of land, situate near Paw-Paw Creek, and near the Bergen Oil Co. Mills at one-fifth ($\frac{1}{5}$) the oil, royalty, on which there is now a well about eighty-four (84) feet deep.

A lease of about sixty-six acres (66) for twenty (20) years at one-fifth ($\frac{1}{5}$) the oil, royalty, situate on Second Creek.

A lease of about forty (40) acres for twenty (20) years at one-fifth ($\frac{1}{5}$) the oil, royalty, situate near Duck Creek. All the above in Washington County, Ohio, as described on *on* maps exhibited by said Kimball. Said Kimball agrees to transfer to said purchasers said lands and leases, with good and perfect titles for same, for the sum of twenty-two thousand dollars ($22,000.00,) and upon payment of said amount to said Kimball, the operations and dispositions of said lands, leases, &c., to
11 be governed by the undersigned; the extent of control of each signer to be regulated by the amount subscribed and paid upon said amount of ($22,000.00.)

Witness our hands and seals this twenty-second (22nd) day of February, 1865.

C. AULTMAN.	[SEAL.]	2	shares.....	$2,000
JACOB MILLER.	[SEAL.]	"	"	2,000
GEORGE COAK.	[SEAL]	1	"	1,000
C. SCHAEITZE.	[SEAL.]	1	"	1,000
R. C. KIMBALL.	[SEAL.]	1	"	1,000
DEUBLE BROS.	[SEAL.]	1	"	1,000
J. H. BAIR.	[SEAL.]	½	"	500
W'M F. EVANS.	[SEAL.]	1	"	1,000
J. G. WEBSTER.	[SEAL.]	1	"	1,000
JAMES B. ESTEP.	[SEAL.]	1	"	1,000
E. BALL.	[SEAL.]	1	"	1,000
SHORB AND KEMBALL.	[SEAL.]	1	"	1,000
A. M. BURKE.	[SEAL.]	1	"	1,000
L. MILLER.	[SEAL.]	2	"	2,000
RAYNOLDS AND SEXTON.	[SEAL.]	1	"	1,000
ISAAC HARTER.	[SEAL.]	1	"	1,009
DAVID ZOLLAR.	[SEAL.]	½	"	500
D. B. WHITACRE.	[SEAL.]	½	"	500
E. P. GRANT.	[SEAL.]	½	"	500
A. HUSFORD.	[SEAL.]	½	"	500
U. R. FRATHER.	[SEAL.]	1	"	1,000
JOHN M. FABER.	[SEAL.]	½	"	500
JOS. C. RICHARDS.	[SEAL.]	½	"	500
JA'S W. UNDERHILL.	[SEAL.]	½	"	500
E. W. I. LINDENSMITH.	[SEAL.]	½	"	500

I hereby acknowledge the receipt of the within-named monies, and agree to transfer to the subscribers the title to within-named
12 lands and leases, as per the agreement, on demand.

Canton, M'ch 22d, '65.

R. C. KIMBALL.

Witness:
G. A. SHUPER.

[5-cents stamp, cancelled.] 5-cents stamp, cancelled.]

Answer of J. W. Underhill.

Answer of J. W. Underhill, filed in common pleas, December 8th, 1865.

Court of common pleas, Stark County, Ohio.

WILLIAM F. EVANS ET AL., PLAINTIFFS, *vs.* RICHARD C. KIMBALL ET AL., DEFENDANTS. } Answer of James W. Underhill, defendant.

The said James W. Underhill, for answer to said plaintiffs' petition, says that the facts set forth in said petition are substantially true and correct, and that he, the said defendant, has also sustained damage, by reason of the acts complained of in said petition, in the manner and to the extent of his said subscription, and is also entitled to the relief asked in said petition. He therefore joins the plaintiffs in the prayer of their said petition, and asks a judgment against the said Richard C. Kimball for the sum of five hundred dollars, and also such other and further relief as may be deemed just and equitable and proper.

MEYERS AND MANDERSON,
Attorneys for Defendant.

THE STATE OF OHIO,
Stark County, ss :

James D. Underhill makes oath and says that he believes the facts set forth in his above answer are true, as he verily believes.

JA'S W. UNDERHILL.

13 Sworn to before me, and signed in my presence this 8th day of December, 1865.

[SEAL.] SERAPHIUS MEYER,
Notary Public in for said County.

Answer of Ric'd C. Kimball.

Answer of Richard C. Kimball, filed in common pleas April 13th, 1866.

In the court of common pleas of Stark County, Ohio.

WILLIAM F. EVANS AND OTHERS, PLAINTIFFS, *vs.* RICHARD C. KIMBALL AND OTHERS, DEFENDANTS. } Separate answer of Richard C. Kimball.

The defendant Richard C. Kimball, in answer to the petition of the plaintiffs, denies that on the 22nd day of March, 1865, or at any other time, he represented to the plaintiffs, or any of them, or to the persons joined with him, and the said George S. Shorb and William Kimball, as defendants in this action, or to any of them, that he, the said Kimball, had good reason to believe, and was certain that petrolium or coal-oil, in large quantity, or in any quantity whatever, was contained on, or could be obtained from, the lands described in said petition, and in an agreement attached thereto, and made a part thereof. The said defendant denies that he represented to the said plaintiffs, or to the defendants joined with him, as aforesaid, or to any or either of said plaintiffs or defendants, that he could purchase the first two tracts of land mentioned in said agreement, and obtain leases of the other tracts of land mentioned in said agreement, for the sum of twenty-two thousand dollars, or for any other specified sum. And he denies that he solici-
14 ted or requested the said plaintiffs, or the said persons so joined with him as defendants, or any of said plaintiffs or defendants to unite with him, in purchasing or leasing said lands, as in the said petition is alleged. The said defendant denies that the said plaintiffs and so-joined defendants, or any of them, agreed to unite with him, the said defendant, in purchasing or leasing said lands, or any part thereof. And the said defendant denies that the said parties, or any of them, signed the agreement in the petition set forth for the purpose of raising a fund to be placed in the hands of said Richard C. Kimball, as a trustee or an agent, or in any otherwise, to be used by him in behalf of said parties, or any of them, in the purchasing or leasing of said lands. And he denies that any money was ever paid to him by any of said parties for such purpose. And denies that he acted, or was appointed to act, as their trustee or agent, as in said petition is alleged.

The defendant denies all the allegations in said petition charging him with false or fraudulent representations in regard to the quality, value, condition, or character of the said lands; and denies that, by any false-

hood or fraud, deceit or concealment, *that* he induced the said parties, or any of them, to contribute toward the purchase of said lands or leases—the respective sums by them paid to the defendant. He also denies that he, at any time, represented to any one of said parties that he, the said defendant, paid, or was to pay, twenty-two thousand dollars, or any other specified sum for the said lands and leases.

15 And as to the allegation that said lands and leases are not in fact worth more than fifteen hundred dollars, and were of no value whatever for the purpose of the said parties, the defendant answers that, for want of proper observations taken and investigation made by the process of boring and other methods of ascertainment, he is not able to admit or deny the statement of the petition in that regard, but says that after the sale of said property by the defendant to the said parties, they organized themselves as a joint-stock company with said property as their only capital, which they estimated and extensively advertised as being of the value of four hundred thousand dollars, and sold stock at fifty per cent. of that estimate.

The defendant denies that the said plaintiffs, or his so-joined co-defendants, on any occasion, exacted or requested of him any statement whatever of the amount of money paid or to be paid by him for said property, and that he never refused to them, or any one of them, to make a full statement of the facts in that respect until after this action was brought.

The defendant avers the material facts in reference to said lands and the transactions of the parties to this action in relation thereto to be as follows: At the time of entering into said agreement the indications of oil on said lands, as they are ordinarily regarded by experimenters in search of that article, were, in the judgment of the defendant, favorable, and induced in his mind the belief that petroleum in compensating quantities could be there found, and that it would be profitable to purchase or lease the *the* said land and apply the ordinary processes

16 for the obtaining of such oil, and that the said plaintiffs and the defendants joined as aforesaid, desiring to make investments in the oil-business, agreed with the said Richard C. Kimball to furnish and assure to them the lands and leases specified in the written agreement in said petition set forth, and in consideration thereof to pay to the said defendant the sum and consideration in said agreement mentioned, and the defendant believing said lands to be suitable for said purpose, purchased and leased them in his own right and in pursuance of said agreement, without any false, fraudulent, or fictitious representations, and having frequently admonished and cautioned the said parties of the liability to erroneous judgment as to the value of said lands for the purpose proposed, and they being fully advised of all the facts in the premises known to the said Kimball, he, the said Kimball, sold, assured, and conveyed to them the said lands and leases whereby the said agreement was, on the part of the said defendant, fully performed. And in further answer to the allegations in said petition that he agreed to purchase the said property as the agent or trustee of said parties, or with their money, or that they furnished him with funds for that purpose, the said defendant avers that he paid only his own funds for said property, and that a large portion of the purchase-money to be paid to him by the terms of said agreement was not paid until long after the business of said purchase by him and sale to the said parties had been consummated; that the said William F. Evans, after the date of said agreement, paid him only $500, and for the balance gave to the

17 said defendant his promissory note, without interest, payable in

30 days; and others of said parties paid him as follows: Jacob Miller gave his note to the defendant for $2,000, payable in 60 days; George Cook gave his note at 60 days for $1,000; James B. Estep paid $500, and the balance of $1,000 at the end of 30 days; Ephraim Ball gave his note at 60 days for $1,000; Augustus M. Burke paid $300 in jewelry and $700 in a part of the purchase-price of a town-lot in Canton; Lewis Miller paid $1,000 at the end of 30 days, and $1,000 at the end of 60 days; Cornelius Aultman paid $2,000 at the end of 60 days; John F. Raynolds paid $500 down and $500 at the end of 90 days; all of which sums bore no interest, and were paid to the said defendant after the said transfer to them of the lands and leases aforesaid.

The said defendant denies all fraudulent combination or confederation between him and the said George L. Shorbe and William Kimball, or with either of them, to defraud the plaintiffs, as alledged in said petition; and having fully answered said petition, he asks judgment against the plaintiffs for the costs of this action.

BLISS AND McSWEENEY,
Def't's Att'ys.

STATE OF NEW YORK,
City and County of New York, ss:

I, Richard C. Kimball, on my oath, say that I am the defendant named in the foregoing answer, and that the facts stated in said answer are true, as I believe.

R. C. KIMBALL.

18 Sworn to by said Richard C. Kimball and subscribed to by him in my presence, this 11th day of April, 1866.

[SEAL.] A. H. NONES,
Notary Public, New York.

Answer of C. Aultman.

Answer of Cornelius Aultman, filed in the court common pleas, May 7th, 1866.

In the court of common pleas of Stark County, Ohio.

WILLIAM EVANS AND OTHERS, PLAINTIFFS,
vs.
RICHARD C. KIMBALL AND OTHERS.
} Answer of defendants Cornelius Aultman.

The said defendant Cornelius Aultman, in answer to the petition of the plaintiffs, says that he did not subscribe or pay the sum mentioned in said petition to the said Richard C. Kimball, to be used by the said Kimball, as the agent or trustee of the said defendants and of the plaintiffs and of his co-defendants, in the purchase of the lands and leases in said petition set forth, as in said petition alledged; but, on the contrary, he says that he and the said plaintiffs and his co-defendants subscribed the sums stated in the written agreement attached to the plaintiffs' petition as the purchase-prices of their several shares of said lands and leases, and that the transaction between said subscribers and the said Richard C. Kimball was a bargain and sale by the said Kimball to the said subscribers of the lands and leases in the petition described,

19 without any agency or trust on the part of said Kimball for or in

behalf of said subscribers. The said defendant further says, in answer to the allegations of said petition, that he has no knowledge that the said Kimball made any false or fraudulent statements or representations to him, or to any of the said subscribers and parties to the action, as to the value, quality, or condition of said lands, or their capacity to yield oil, or that he stated or was required to state for what price or sum of money he had obtained or could obtain said lands and leases.

BLISS AND McSEEENY AND
G. E. BALDWIN, *Def't's Att'ys.*

STATE OF OHIO, *Stark County, ss:*

Cornelius Aultman says that he is the defendant named in the foregoing answer, and that the facts therein stated he believes to be true.

CORNELIUS AULTMAN.

Sworn to by the said Cornelius Aultman before me, and subscribed by him in my presence this 7th day of May, 1866.

[SEAL.] DANIEL TONNER,
Notary Public.

Answer of Jno. F. Raynolds.

Answer of John F. Reynolds, filed in common pleas, May 12th, 1866.

THE STATE OF OHIO, *Stark County, ss:*

Court of common pleas.

WILLIAM F. EVANS AND OTHERS, PLAINTIFFS, *against* RICHARD C. KIMBALL AND OTHERS, DEFENDANTS. } Answer of John F. Reynolds.

20 The said John F. Reynolds, defendant, for answer to the petition of the plaintiffs, says that he did not subscribe or pay the sum mentioned in said petition to the said Richard C. Kimball, to be used by the said Kimball as the agent or trustee of the said defendant and of the plaintiffs and his co-defendants, in the purchase of the lands and leases in said petition set forth, as in said petition is alledged; but, on the contrary, he says that he and the said plaintiffs and his said co-defendants subscribed the sums stated in the written agreement attached to the plaintiffs' petition as the purchase-price of their several shares of said lands and leases, and that the transaction between said subscribers and the said Richard C. Kimball was a bargain and sale by the said Kimball to the said subscribers of the lands and leases in the petition described, without any agency or trust on the part of said Richard C. Kimball for or in behalf of said subscribers. The said defendant further says, in answer to the allegations of said petition, that he has no knowledge that the said Kimball ever stated to him, or to any of the said subscribers and parties to this action, or was required to state for what price or sum of money he had obtained or could obtain said lands or leases.

BLISS AND McSWEENEY AND
GEO. E. BALDWIN, *Att'ys for Def'd'ts.*

STATE OF OHIO, *Stark County, ss:*

John F. Reynolds, being sworn, says he is the defendant named in the foregoing answer, and that the facts therein stated are true, as he verily believes.

JOHN F. RAYNOLDS.

21 Sworn to before me by said John F. Reynolds, and by him signed, in my presence, this 12th day of May, 1866.

[SEAL.] GEO. E. BALDWIN,
Notary Public.

Answer of C. Schweitzer.

Answer of Conrad Schweitzer, filed in common pleas, May 21st, 1866.

THE STATE OF OHIO, *Stark County, ss:*

Court of common pleas.

WILLIAM F. EVANS AND OTHERS, PLAINTIFFS, *against* RICHARD C. KIMBALL AND OTHERS, DEFENDANTS. } Answer of Conrad Schweitzer.

The defendant Conrad Schweitzer, in answer to the petition of the plaintiffs, says that he did not subscribe or pay the sum mentioned in said petition to the said Richard C. Kimball, to be used by said Kimball, as the agent or trustee of the said defendant and of the plaintiffs and his co-defendants, in the purchase of the lands and leases in said petition set forth, as in said petition is alledged; but, on the contrary, he says that he and the said plaintiff and his said co-defendants subscribed the sums stated in the written agreement attached to the plaintiffs' petition as the purchase-price of their several shares of said lands and leases, and that the transaction between said subscribers and the said Richard C. Kimball was a bargain and sale by the said Kimball to the said subscribers of the lands and leases in the petition described, without any agency or trust on the part of said Kimball for or in behalf of
22 said subscribers. The said defendant further says, in answer to said petition, that he has no knowledge that the said Kimball made any false or fraudulent statements or representations to him, or to any of said subscribers and parties to this action, as to the value, quality, or condition of said lands, or their capacity to yield oil, or that he stated or was required to state for what price or sum of money he had obtained or could obtain said lands and leases.

BLISS AND MCSWEENEY AND
GEO. E. BALDWIN, *Att'ys for Def'n't.*

THE STATE OF OHIO, *Stark County, ss:*

C. Schweitzer, being sworn, says he is the defendant named in the foregoing answer, and that the statements contained in said answer are true, as he verily believes.

C. SCHWEITZER.

Sworn to before me by said C. Schweitzer, and by him signed in my presence, this 21st day of May, 1866.

[SEAL.] GEORGE E. BALDWIN,
Notary Public.

23 District court.

And afterwards, to wit, on the 18th day of April, A. D. one thousand eight hundred and sixty-eight, the said defendants Richard C. Kimball, George C. Shorb, and William C. Kimball, filed in the district court of

Stark County their petition and affidavits praying for the removal of this cause from said court to the circuit court of the United States for the northern dist. of Ohio; which petition is in the words and figures following, to wit:

Petition for removal to U. S. court, N. dist.

In the district court of Stark County, Ohio.

RICHARD C. KIMBALL, GEORGE S. SHARB, AND William C. Kimball, plaintiffs,
against
WILLIAM F. EVANS, ELIJAH P. GRANT, JOSEPH C. Richards, Jacob Miller, George Cook, Jacob H. Bair, James B. Webster, James B. Estep, Ephraim Ball, Augustus M. Burke, Lewis Miller, David Zallars, Alexander Husford, John M. Faber, Edward W. I. Lindesmith, Martin Deuble, George Deuble, Conrad Schweitzer, Cornelus Aultman, Isaac Harter, Daniel B. Whitacre, Uriah R. Feather, James W. Underhill, John F. Raynolds, and Joseph Saxton, defendants. } Petition.

The said Richard C. Kimball, George S. Sharb, and William C. Kimball, represent that on the seventh day of October, A. D. 1865, the said William F. Evans, Elijah P. Grant, Joseph C. Richards, Jacob Miller, George Cook, Jacob H. Bair, James G. Webster, James B. Estep, Ephraim Ball, Augustus M. Burke, Lewis Miller, David Zallars, Alexander Husford, John M. Faber, Edward W. I. Lindesmith, Martin Deuble, and George Deuble filed their certain petition in the court of
24 common pleas of Stark County, Ohio, against the said Richard C. Kimball, George S. Shorb, William C. Kimball, Conrad Schweitzer, Cornelius Aultman, Isaac Harter Daniel B. Whitacre, Uriah R. Feather, James W. Underhill, John F. Raynolds, and Joseph Saxton, setting forth a pretended cause of action against the said Richard C. Kimball, George S. Sharb, and William C. Kimball, only, and praying for relief against the said Richard C. Kimball, George S. Sharb, and William C. Kimball, only, but setting forth no cause of action against the said Cornelius Aultman, Isaac Harter, Daniel B. Whitacre, Uriah R. Feather, James W. Underhill, John F. Reynolds, Joseph Saxton, and Conrad Schweitzer, nor praying relief against them; indeed the reason why they were made defendants was because they would not consent to be joined as plaintiffs.

These petitioners further say that these petitioners, defendants in said original petition appeared in said court of common pleas, and filed their answers to said petition, and on the hearing of said cause the petition of said plaintiffs in said court of common pleas was dismissed, and thereupon the same was appealed to this court, and the same is now pending in this court. These petitioners further say that they are not citizens of the said State of Ohio; on the contrary, the said Richard C. Kimball and George S. Shorb are now, and for a long time have been in good faith citizens and residents of the State of New York, and the said William C. Kimball has for a long time been, and now is, a bona-fide citizen and resident of the State of Louisiana. The said George S. Shorb, was at the time this suit was commenced in the said court

25 of common pleas, a citizen and resident of the city of New York, and still continues to be a citizen and resident of the State of New York; all the other parties to said suit now pending in this court were at the time of the commencement thereof citizens of the said State of Ohio, and still are, except Augustus M. Burke, Daniel B. Whatacre, and Conrad Schweitzer.

The matter in dispute between these petitioners and the other parties to the proceedings now pending in this court, and between each of them, exceeds the sum of five hundred dollars, exclusive of costs.

These petitioners now come and file their affidavits, stating that they have reason to, and do believe, that from prejudice and local influence they will not be able to obtain justice in this court, and they file thus their petition praying for the removal of the said suit now pending in this court into the next circuit court of the United States in the northern district of the State of Ohio, the district within which the said Stark County is situated, where said suit is now pending, and they here offer good and sufficient surety for their entering in said circuit court of the United States for the northern district of Ohio, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as by the act of Congress of the United States, entitled "An act for the removal of causes in certain cases from State courts," approved July 27th, eighteen hundred and sixty-six, are required to be done upon the removal of a suit into the United States court.

The petitioners therefore pray your honors to fix the amount of
26 the bond or undertaking to be entered into by said sureties, and that your honors proceed no further in said cause, except to order said cause to be removed to said United States circuit court, in accordance with the prayer of this petition.

JOHN McSWEENEY,
J. A. AMSBLER,
PIERCE AND PEASE, AND
GEO. E. BALDWIN,
Att'ys for Petitioners.

THE STATE OF OHIO, *Stark County, ss:*

Richard C. Kimball, being sworn, says he is one of the petitioners in the above petition, and that he believes the statements contained in the foregoing petition to be true.

RICHARD C. KIMBALL.

Sworn to and subscribed before me, by the said Richard C. Kimball, this day of February, A. D. 1868.

[SEAL.] GEO. E. BALDWIN,
Notary Public.

Affidavit of R. C. Kimball.

Affidavit of R. C. Kimball.

In the district court of Stark County, Ohio.

WILLIAM F. EVANS AND OTHERS, PLAINTIFFS,
against
RICHARD C. KIMBALL AND OTHERS, DEFENDANTS. } Civil action.

Now comes RICHARD C. KIMBALL, one of the defendants in the above-

entitled cause, and being sworn, says that he is a bona-fide citizen and resident of the State of New York, within the United States;
27 that George S. Shorb, one of said defendants, is also a bona-fide citizen and resident of said State of New York, and was a citizen and resident of said State of New York at the commencement of this suit; that William C. Kimball, also one of the defendants in said cause, is a bona-fide citizen and resident of the State of Louisiana, within the United States; and that said William F. Evans and the other plaintiffs, except Augustus M. Burk, are citizens and residents of the State of Ohio. Said Richard C. Kimball, on his oath aforesaid, further states and says that he has reason to, and does believe, that, from prejudice and local influence, he and his associate defendants, viz, George S. Shorb and William C. Kimball, will not be able to obtain justice in this court. The matter in dispute between said plaintiffs and said defendants exceeds the sum of five hundred dollars, exclusive of costs.

RICHARD C. KIMBALL.

Sworn to before me and signed in my presence by R. C. Kimball, Feb'y 25th, 1868.

[SEAL.] W'M MCKINLEY, JR.,
Notary Public.

Affidavit of Geo. S. Shorb.

Affidavit of George F. Shorb.

In the district court of Stark County, Ohio.

WILLIAM F. EVANS AND OTHERS, PLAINTIFFS, *against* RICHARD C. KIMBALL AND OTHERS, DEFENDANTS. } Civil action.

Now comes GEORGE F. SHORB, one of the defendants in the above-entitled cause, and being sworn says that at the time this suit was commenced and before that time he was and still is a bona-fide
28 citizen and resident of the State of New York, one of the States of the United States; that said Richard C. Kimball, one of the defendants, is a bona-fide citizen and resident of the said State of New York, and that William C. Kimball, another of said defendants, is a bona-fide citizen and resident of the State of Louisiana, within said United States; that said William F. Evans and the other plaintiffs, except the said Augustus M. Burke, are citizens and residents of the said State of Ohio. Said George F. Shorb, on his oath aforesaid, further states and says that he has reason to and does believe that from prejudice and local influence he and his associate defendants, viz, Richard C. Kimball and William C. Kimball will not be able to obtain justice in this court. The matter in dispute between said plaintiffs and said defendants exceeds the sum of five hundred dollars, exclusive of costs.

G. F. SHORB.

Subscribed and sworn to the truth of the above by G. F. Shorb, this 29th February, 1868.

[SEAL.] J. B. NONES,
Comm'r of Ohio in N. Y., 262 Broadway.

Affidavit of W. C. Kimball.

Affidavit of William C. Kimball.

In the district court of Stark County, Ohio.

WILLIAM F. EVANS AND OTHERS, PLAINTIFFS,
against
RICHARD C. KIMBALL AND OTHERS, DEFENDANTS. } Civil action.

Now comes WILLIAM C. KIMBALL, one of the defendants in the above entitled cause, and, being sworn, says that he is a bona-fide citizen and resident of the State (or Territory) of Louisiana, within the United States; that said Richard C. Kimball is a bona-fide citizen and
29 resident of the State of New York, within said United States, and that George F. Shorb, also one of the defendants, was at the time of the commencement of this suit, and still is, a bona-fide citizen and resident of said State of New York; that said William F. Evans and the other plaintiffs, except Augustus M. Burk, are citizens and residents of the State of Ohio. Said William C. Kimball, on his oath aforesaid, further states and says that he has reason to and does believe that, from prejudice and local influence, he and his associate defendants, viz, Richard C. Kimball and George F. Shorb, will not be able to obtain justice in this court. The matter in dispute between said plaintiffs and said defendants exceeds the sum of five hundred dollars, exclusive of costs.

W'M C. KIMBALL.

STATE OF LOUISIANA,
City of New Orleans:

I, James Graham, a commissioner of the State of Ohio, duly appointed and commissioned by the governor thereof in and for the State of Louisiana, officiating as such in said city of New Orleans, do certify that the above-named William C. Kimball subscribed the foregoing affidavit or answer in my presence at my office in said city of New Orleans and did depose and swear that the matters therein set forth were true.

In faith whereof I have hereto set my hand and seal at New Orleans, this twenty-fifth of February, A. D. 1868.

[SEAL.]

JA'S GRAHAM,
Commissioner.

30 *Affidavit of Geo. E. Baldwin.*

Affidavit of Geo. E. Baldwin.

In the district court of Stark Co., Ohio.

WILLIAM F. EVANS AND OTHERS, PLAINTIFFS,
against
RICHARD C. KIMBALL AND OTHERS, DEFENDANTS.

GEORGE E. BALDWIN, being sworn, says he is one of the att'ys for the defendants Richard C. Kimball, George F. Shorb, and William C. Kimball, in the above action. He further says that the said Jacob G.

Webster, one of the plaintiffs, was a resident of the State of Ohio at the time of the commencement of the suit, but removed from the State in October, A. D. 1866, and continues to be a non-resident until the present time; that Augustus M. Burke, one of the plaintiffs, was at the commencement of the suit, and still is, a non-resident of the State of Ohio; that said Webster is now a resident of the State of Nebraska, and said Burke of the State of West Virginia, and that all the other plaintiffs were at the commencement of said suit, and still are, residents of the State of Ohio; that the defendant Richard C. Kimball was at the date of the commencement of this suit a resident of the State of Ohio, but had some time before been doing business as a merchant in the city and State of New York, and at the time of the commencement of the suit, contemplated removing thereto, and had then in fact disposed of his business in Ohio with a view to such removal, but did not remove to or become a citizen of New York until after the commencement of the suit, to wit, on or about the day of September, A. D. 1865, when he removed to New York as aforesaid; that said defendant
31 George F. Shorb was at the commencement of the suit, and now is, a non-resident of the State of Ohio and a resident of the city and State of New York; that the defendant William C. Kimball at the date of the commencement of the suit was a resident of the State of Ohio, and afterwards, to wit, on the day of October, A. D. 1865, removed to and became and now is a resident of the city of New Orleans, in the State of Louisiana; that the said Conrad Sweitzer, defendant, was at the date of the commencement of the suit a resident of the State of Ohio, but afterwards, to wit, on the day of September, A. D. 1866, removed to and became and now is a resident of the city and State of New York; that the said Daniel B. Whitacre, defendant, was at the commencement of said suit a citizen and resident of the State of Ohio, but afterward, to wit, on or about the first day of April, A. D. 1866, removed to and become and now is a resident of the city of Chicago and State of Illinois, and that all the other defendants were at the date of the commencement of this suit, and still are, residents of the State of Ohio. The said affiant further says that each and all of said parties, plaintiffs and defendants, are citizens of the United States and citizens of the States in which they respectively reside, as herein stated.

GEO. E. BALDWIN.

Sworn to before me by the said Geo. E. Baldwin, and by him signed in my presence April 20th, 1868.

A. W. HELDENBRAND, *Clerk.*

32 Supreme court.

And afterwards, in the said December term, A. D. 1870, of our said supreme court, to wit, on the seventh day of March, in the year of our Lord one thousand eight hundred and seventy-one, before the judges first aforesaid, this cause came on to be heard upon the pleadings and evidence submitted, and was argued by counsel.

Judgement.

On consideration whereof it is ordered and adjudged that the petition of Richard C. Kimball and others, filed in the district court for the removal of said cause to the circuit court of the United States for the

northern district of Ohio, be, and the same is, dismissed, at the cost of the petitioners, and this cause is remanded to the said district court of Starke County, for further proceedings, according to law.

Certifies to involving "act of Congress."

And upon the application of said plaintiffs, it is certified by the court here that the said plaintiffs, on the hearing of this case in this court, set up and relied upon for the removal of this cause from the State court to the circuit court of the United States, an act of Congress of the United States entitled "An act to amend an act entitled 'An act for the removal of causes in certain cases from State courts,' approved March 2d, 1867." And it is further certified by the court here that, upon the hearing of this cause in this court, the construction of said act of Congress before mentioned was drawn in question, and that the decision of this court was against the said claims of the plaintiffs, and said act of Congress, construed by this court not to apply to this case, and that the question of the construction of said act of Congress was necessarily raised and decided in rendering the judgment dismissing said petition for the removal of said cause.

33 THE STATE OF OHIO:

Supreme court of the State of Ohio.

I, Rodney Foos, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing is truly taken and correctly copied from the original records of said court, in the case of W'm F. Evans et al. against Richard C. Kimball and others.

In witness whereof I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Ohio, this 31st day of March, A. D. 1871.

[SEAL.]

RODNEY FOOS,
Clerk Sup. C't of Ohio.

34 Supreme Court of the United States, April 10th, 1871.

To Mr. JUSTICE SWAYNE,
Judge of the Supreme Court of the United States:

Richard C. Kimball, George S. Sharb, & William C. Kimball, of the city of New York, respectfully represent that they now are & have been, since the first day of April, 1868, bona-fide residents & citizens of the city & State of New York; & that, as such residents & citizens, on the 18th day of April, 1868, in a suit instituted by William F. Evans & others, as residents & citizens of the State of Ohio, against them, & then pending in the district court of Stark County, Ohio, filed their petition for the removal of said cause to the United States circuit court for the northern district of Ohio, for grounds duly set out & proven by affidavits, as is fully shown in the record hereto attached; & that the said cause on said petition was duly reserved in said district court for decision by the supreme court of the State of Ohio. And afterwards, at the December term of the supreme court of Ohio, 1871, said court in due form, heard said petition, & determined the same,
35 & dismissed said petition; all of which fully appears in the said record hereto attached.

And petitioners respectfully state that there is error in said record & proceedings, & that they were by law entitled to the removal of said cause from said State court to the said United States circuit court.

Wherefore petitioners pray for the allowance of a writ of error from

the Supreme Court of the United States to the supreme court of the State of Ohio, &c., & for the review & reversal of said proceedings.

BARTLEY & CASEY,
Att'ys for Petitioners.

(Indorsed:) Richard C. Kimball, George S. Sharb, & William C. Kimball, petitioners, vs. William F. Evans & others, respondents. Petition for the allowance of a writ of error. By Bartley & Casey, att'ys for petitioners.

36 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of Ohio, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Ohio, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Richard C. Kimball, George S. Sharb, and William C. Kimball, petitioners, and William F. Evans, Elijah P. Grant, Joseph C. Richards, Jacob Miller, George Cooke, Jacob H. Baier, James G. Webster, James B. Estep, Ephraim Ball, Augustus M. Burke, Lewis Miller, David Zallas, Alexander Huryford, John M. Faber, Edward W. I. Lindesmith, Martin Deuble, George Deuble, Conrad Schweitzer, Cornelius Aultman, Isaac Harter, Daniel B. Whitacre, Uriah B. Feather, James W. Underhill, John F. Raynolds, and Joseph Saxton, respondents, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their
37 validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said petitioners, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy.

Issued 13th April, 1871.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

N. H. SWAYNE,
Asso. Jus. Sup. C't U. S.

38 THE STATE OF OHIO, *Supreme Court:*

I, Rodney Foos, clerk of the supreme court of the State of Ohio, in obedience to the command of the within writ, do return herewith an authenticated transcript of the record of the proceedings and judgments of said court in the case of W'm F. Evans against Richard C. Kimball and others, reserved by order of the district court of Starke County, Ohio, for decision in this court, together with all things touching the same, so far as they remain of record herein.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of Ohio, at the capitol, city of Columbus, this 19th day of April, A. D. 1871.

[SEAL.]

RODNEY FOOS,
Clerk Supreme Court of Ohio.

39 The United States of America to William F. Evans, Elijah P. Grant, Joseph C. Richards, Jacob Miller, George Cooke, Jacob H. Baier, James G. Webster, James B. Estep, Ephraim Ball, Augustus M. Burke, Lewis Miller, David Zallas, Alexander Huryford, John M. Faber, Edward W. J. Lindesmith, Martin Deuble, George Deuble, Conrad Schweitzer, Cornelius Aultman, Isaac Harter, Daniel B. Whitacre, Uriah B. Feather, James W. Underhill, John F. Raynolds, and Joseph Saxton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Ohio, wherein Richard C. Kimball, George S. Sharb, and William C. Kimball are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why judgment, rendered against the said plaintiff' in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Noah H. Swayne, associate justice of the Supreme Court of the United States, this thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy one.

N. H. SWAYNE,
Asso. Jus. Sup. C't U. S.

40 On this 15th day of May, in the year of our Lord one thousand eight hundred and seventy-one, personally appeared before me, the subscriber, William Baxter, and makes oath that he delivered a true copy of the within citation to W'm F. Evans, Elijah P. Grant, Joseph C. Richards, Jacob Miller, George Cook, Jacob H. Bair, James G. Webster, James B. Estep, Ephraim Ball, David Zollars, Alexander Hurford, John M. Faber, Edward W. J. Lindesmith, Martin Deuble, George Deuble, Cornelius Aultman, Isaac Harter, Uriah R. Feather, James W. Underhill, John F. Raynolds, and Joseph Saxton. The other defendants herein named are not found in my county.

WILLIAM BAXTER.

Sworn to and subscribed the 15th day of May, A. D. 1871.

[SEAL.]

A. W. HELDENBRAND,
Clerk Com. Pleas Court, Stark County, Ohio.

41 Know all men by these presents that we, Richard C. Kimball, T. W. Bartley, and Joseph Casey, are held and firmly bound unto William F. Evans, in the full and just sum of five hundred dollars, to be paid to the said obligees, their certain attorney, executors, adminis-

trators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately, at a supreme court of the State of Ohio, in a suit depending in said court, between Richard C. Kimball, George S. Sharb, and William C. Kimball, petitioners, and the above-named obligees, respendents, judgment was rendered against the said Richard C. Kimball, George S. Sharb, and William C. Kimball, and the said Richard C. Kimball, George S. Sharb, and William C. Kimball, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said obligees, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Richard C. Kimball, George S. Sharb, & W'm C. Kimball shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

R. C. KIMBALL. [L. S.]
(S'g'd) T. W. BARTLEY. [L. S.]
(S'g'd) JOS. CASEY. [L. S.]

Sealed and delivered in presence of—
E. D. CLARK.
G. A. BETTS.

Approved by—
(S'g'd) N. H. SWAYNE
Asso. Jus. Sup. C't U. S.

42 THE STATE OF OHIO, *City of Columbus, ss:*
Supreme court of Ohio.

To the judges of the district court within and for the county of Starke, greeting:

You are hereby notified that, in the case of W'm F. Evans et al., against Richard C. Kimball and others, lately reserved by the order of your court, for decision in the supreme court of Ohio, a writ of error has been allowed by Honorable N. H. Swayne, associate justice of the Supreme Court of the United States; and that the same has been entered of record in this court, and authenticated transcript of the proceedings and judgements of this court has been duly certified to said Sup. Court. U. S.

Witness my hand and the seal of the supreme court of the State of Ohio, this 20th day of April, A. D. 1871.

[SEAL.] RODNEY FOOS,
Clk Supreme Court of O.

(Indorsed:) Supreme court of Ohio. W'm F. Evans et al. against Richard C. Kimball et al. Notice to dist. court, Starke Co.

(Indorsement on cover:) No. 329. Richard C. Kimball, George S. Sharb, & W'm C. Kimball, plaintiffs in error, vs. William F. Evans, Elijah P. Grant, Joseph C. Richards, Jacob Miller, et al. Ohio sup. court. Filed 9th January, 1872.

Supreme Court of the United States,

OCTOBER TERM, 1876.

No. 4.

RICHARD C. KIMBALL, GEORGE S. SHORB, AND WM. C. KIMBALL,

PLAINTIFFS IN ERROR,

vs.

WILLIAM F. EVANS AND OTHERS,

DEFENDANTS.

BRIEF FOR PLAINTIFFS IN ERROR,

By T. W. BARTLEY.

WASHINGTON, D. C.:
W. H. MOORE, PRINTER, 511 ELEVENTH ST.
1876

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1876.

No. 4.

RICHARD C. KIMBALL, GEORGE S. SHORB, AND WM. C. KIMBALL,

PLAINTIFFS IN ERROR,

vs.

WM. F. EVANS, ELIJAH P. GRANT, JOSEPH C. RICHARDS, JACOB MILLER, GEORGE COOK, JACOB H. BAIR, JAMES G. WEBSTER, JAS. B. ESTEP, EPHRAIM BALL, AUGUSTUS M. BURKE, LEWIS MILLER, DAVID ZELLARS, ALEXANDER HURFORD, JOHN M. FABER, EDWARD W. L. LINDENSMITH, MARTIN DEUBLE, AND GEORGE DEUBLE, AND EIGHT OTHERS.

DEFENDANTS.

BRIEF FOR THE PLAINTIFFS IN ERROR.

Statement of the Case.

This is a proceeding in error to reverse the judgment of the Supreme Court of Ohio on the single question of the right of the appellants or plaintiffs in error to remove the case, under the laws of the United States, from the State Court to the United States Circuit Court in the northern district of Ohio. The original suit was instituted in the Court of Common Pleas by the filing of a petition, under the Code of Ohio, on the 7th day of October, 1865, in behalf of seventeen parties as plaintiffs against eleven persons as defendants. The plaintiffs are all alleged in

the petition to be residents of Stark county, Ohio, but the place of residence of the defendants is not stated in the petition. (See Record, pp. 2 and 3.) The pretended cause of action set up was the obtaining of money by fraudulent representations, alleged to have been made by said Richard C. Kimball, for the purchase of petroleum lands in Washington county, Ohio, on a subscription signed by each of the plaintiffs and the eleven defendants, severally. This charge of fraud is made, and judgment is asked only against the three appellants, Richard C. Kimball, George S. Shorb, and Wm. C. Kimball. Against the other eight defendants in the original petition *no cause of action whatsoever is alleged, and no judgment asked.*

The plaintiffs do not sue as partners nor as a corporation, and the cause of action, if it existed at all, afforded a plain and adequate remedy at law, either by what was formerly termed *a special action on the case*, or by an action for money had and received. The three appellants, against whom alone any cause of action was set up, and judgment was asked, are, and were when the removal was applied for, non-residents of Ohio, and the eight other defendants, merely nominal or formal parties were, with one or two exceptions, residents of Ohio.

The petition of the plaintiffs in the Court of Common Pleas was dismissed, and they appealed the case to the District Court of Stark county. In that court, where the cause was pending for trial, the three *actual* defendants, the only parties defendant against whom any cause of action was alleged and any judgment was asked, being non-residents of Ohio, (two of them citizens of New York, and the other of Louisiana,) filed a petition in due form for the removal of the case to the jurisdiction of the Federal Court. The District Court reserved the case on the petition for the removal for decision by the Supreme Court of the State, and that court dismissed the petition for removal, with the usual and proper order and certificate for

the review of the question before the Supreme Court of the United States.

The questions arising in this case involve the consideration of the statutes relative to the removal of causes from the State courts to the United States courts.

Touching this subject the judiciary act of 1789 provided as follows:

"SECTION 11. The Circuit Court shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity where . . . *the suit is between a citizen of the State where the suit is brought and a citizen of another State.*

"SECTION 12. If a suit be commenced in any State court against an alien, or *by a citizen of the State in which the suit is brought against a citizen of another State*, and the matter in dispute exceeds the aforesaid sum of $500, . . . and the defendant shall *at the time of entering his appearance* in such State court file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the district where the suit is pending, . . . and offer good and sufficient surety for his entering in such court on the first day of its session copies of said process against him, and also for his there appearing, . . . it shall then be the duty of the State court . . . to proceed no further in the cause, . . . and the said copies being entered as aforesaid in such court of the United States the cause shall there proceed in the same manner as if it had been brought there by original process," &c.

These provisions of the act of 1789 have been interpreted to apply only to those cases in which all the parties plaintiff are citizens of the State where the suit is brought, and all the parties defendant are citizens of another State or States.

The act of July, 1866, on this subject, provides as follows:

"If in any *suit* . . . in any State court against an alien, or *by a citizen of the State in which the suit is brought against a citizen of another State*, and the matter in dispute exceeds the sum of $500, . . . a citizen of the State in which the suit is brought is or shall be a defendant, and if the suit, so far as relates to the alien defendant, or to

the defendant who is a citizen of a State other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining *him*, or if the suit is one in which there can be a final determination of the controversy so far as concerns him without the presence of the other defendants as parties in the cause, then and in every such case the alien defendant, or the defendant who is a citizen of a State other than that in which the suit is brought, may, *at any time before the trial or final hearing of the cause*, file a petition for the removal of the cause as against him into the next Circuit Court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court . . . copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there appearing; . . . and it shall be thereupon the duty of the State court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal; . . . and the said copies being entered as aforesaid in such court of the United States the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant who shall have so filed a petition for its removal as above provided. . . . . .

"And such removal of the cause as against the defendant petitioning therefor into the United States court shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State court as against the other defendants if he shall desire to do so."

Touching this same subject, Congress further enacted in March, 1867, by *way of amendment* to the above-recited act of 1866, as follows:

"That the act entitled 'An act for the removal of causes in certain cases from State courts,' approved July 27, 1866, be, and the same is hereby, *amended* as follows: That where a suit is now pending, or may hereafter be brought, in any State court, in which *there is controversy between a citizen of the State in which the suit is brought and a citizen of another State*, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, *such citizen of another State*, whether he be plaintiff or defendant, if he

shall make and file in such State court an affidavit stating that he has reason to and does believe that, *from prejudice or local influence, he will not be able to obtain justice in such State court, may*, AT ANY TIME BEFORE THE FINAL HEARING OR TRIAL OF THE SUIT, file a petition in such State court for the removal of the suit into the next Circuit Court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as, by the act to which this act is amendatory, are required to be done upon the removal of a suit into the United States court; and it shall be, thereupon, the duty of the State court to accept the surety and proceed no further in the suit; and the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process," &c. (14 U. S. Statutes at Large, pp. 558 and 559.)

This last act was doubtless intended to be an enlargement of the jurisdiction of the Federal courts conferred by the act of July 27, 1866, touching the same subject, and that act was undeniably designed to be an enlargement of the jurisdiction conferred by the 12th section of the judiciary act of '89.

The constitutional provision under which these enactments were made is in the following words:

"The judicial power shall extend . . . to controversies between two or more States, between a State and citizens of another State, *between citizens of different* States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects." (Article 3d, Section 2, of the Constitution.)

ARGUMENT.

As a preliminary, let it be remarked here, that this case is different and distinguishable in material points from the

numerous cases heretofore decided by this Court touching the removal of cases from the State to the Federal courts.

Also, let it be observed, that the decisions made by this Court heretofore upon the 11th and 12th sections of the Judiciary Act of '89, as well as those made under the acts of 1866 and 1867, all relate to the proper interpretation and construction of those several acts, and not of the constitutional provision above recited.

And in reference to the above-recited statutes of '66 and '67, to the interpretation of which attention will be invited, let it be further remarked, that, being *remedial* in their nature, they are entitled, by a rule uniformly recognized in both the English and American courts, *to a liberal construction*. To give to a *remedial* statute that rigid and close construction usually applied to *penal* enactments would not only violate a rule of construction, but also defeat the beneficial objects of the lawmaker. One of the manifest objects of the provision extending the judicial power to controversies between citizens of different States, would seem to be *to secure impartial justice, and to allay apprehensions of injustice from State prejudice and local State influences.* The "Federalist," in reference to this article of the Constitution, says:

"In order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside *in all cases in which one State or its citizens are opposed to another State or its citizens.* To secure *the full effect* of so fundamental a provision against all *evasion and subterfuge*, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." (Federalist, No. 80.)

The question here arises, and is now made, whether *the Constitution has secured "the full effect of so fundamental a provision against* ALL EVASION AND SUBTERFUGE," or

whether the language of the Constitution is so deficient that it is not within the power of Congress to confer the jurisdiction on the Federal courts in such manner as to secure this great safeguard of justice against liability to evasion by subterfuge. The language of the Constitution is broad and explicit, and untrammeled by qualification or limitation. "*The judicial power shall extend . . . to controversies between citizens of different States.*" Interpreted with reference to its subject-matter the term "controversy," as here used, means of course *judicial controversy*, which is a suit or proceeding in some form in court, for it is only by a suit or proceeding in court that the judicial power can be invoked or called into action. *Wherever, therefore*, there is a suit or proceeding in court in which there is *a controversy between citizens of different States*, Congress has the power, by proper legislation, to give to the Federal courts jurisdiction. Can there be any question about this? "*The judicial power shall extend*," &c. Congress having power to regulate the jurisdiction may not confer the entire constitutional authority at once. But the courts cannot change the Constitution or ingraft a qualification or exception on this provision which the language employed does not contain. For instance, suppose the courts should declare that this provision of the Constitution means that the judicial power of the United States shall extend to controversies *exclusively* between citizens of different States, or, in other words, "*to controversies*" between citizens of different States, *except in cases in which there is also a controversy between citizens of the State in which the suit is brought*, what would be said of such an interpretation of the explicit words of the Constitution? It would be adding a qualification or exception to the clear and unqualified language of the Constitution.

No difficulty can arise from allowing the constitutional provision to have its full operation. The plaintiff selects the tribunal in which to bring his suit, shapes the charges of his causes of action, prescribes the form of the action, and

names the parties defendant. For the purposes of justice in case of the contingencies provided for in the Constitution, it is a great safeguard to allow a non-resident defendant the privilege of removing the action to the Federal Court. As it is an aid in obtaining impartial justice in the contemplation of the Constitution, it cannot injure either the plaintiff or the other defendants. It is no greater hardship in having the case removed than having it brought originally in the Federal tribunal.

And a construction which would place it in the power of the plaintiff, in shaping his causes of action and naming the defendants, to preclude the possibility of a resort to the Federal Courts in controversies between citizens of different States, simply for the reason that in the same case there was also a controversy between citizens of the same State, would be not only an evasion of this provision of the Constitution, but also subversive of the benficial purposes which it was intended to secure. It is said that sham or fictitious defendants would not be allowed to defeat the removal, but as a general thing this could not be known, especially until the final hearing or trial of the case, and that would be too late.

The judicial power under the Constitution is made to depend upon one of two conditions; one is *the nature of the subject-matter* of the controversy, and the other is *the character or status* of the parties to the controversy. It extends to every case in which a question arises under the Constitution, laws, and treaties of the United States, or in which a controversy exists between citizens of different States. In either one of these conditions the judicial power of the United States is authorized by the Constitution, and it cannot be defeated because other questions or other parties are involved in the controversy.

Other clauses of the same instrument, and especially other provisions in *pari materia*, often afford important lights in controverted matters of interpretation and construction.

One clause of the judicial article of the Constitution provides, that the judicial power "shall extend to all cases affecting ambassadors, other public ministers, and consuls." Suppose, that a citizen of New York should bring suit against the British consul, and several citizens of the same State in the State court of New York, in regard to a commercial transaction in which the defendants had been jointly concerned, could this provision of the Constitution be defeated because citizens of New York were sued jointly with the consul?

The Constitution provides that the judicial power shall extend *to controversies between a State and citizens of another State.* Suppose that the State of New York should bring suit in the State court of that State against two citizens of Connecticut and two citizens of New York, on an alleged joint transaction, could the Federal judicial authority be defeated because of the joinder of the citizens of New York as parties defendant?

The Constitution provides that the judicial power shall extend *to controversies* "between a State and foreign citizens or subjects." Could this authority be defeated by joining citizens of the State with the foreign citizens or subjects, in bringing the suit in the State Court?

Congress provided in the act of the 2d of March, 1833, for the removal of cases from the State courts to the Federal courts where suits were instituted against revenue officers and other persons claiming to act under color of the revenue laws, &c. (Sec. 4 U. S. Statutes at Large, p. 632.) Again, the act of the 3d of March, 1863, provided for the removal of actions from the State courts against officers, civil or military, or other persons for any arrest or imprisonment made, or other trespasses or wrongs committed, or any act omitted to have been done, &c., during the rebellion.

In applications under these last mentioned acts for removals of cases to the Federal courts, great difficulties

could doubtless have been created by making a multiplicity of defendants and charging numerous causes of action not within the jurisdiction of the Federal courts, had the same strictness been observed in resisting the removals, which is now met with under the act of 1867.

It appears to be conceded, that the power of removal from the State courts, or in other words, the jurisdiction of the Federal court is not defeated because other questions, or causes of action, are involved in the cases sought to be removed than those arising under the Constitution, laws, or treaties of the United States. This was first settled in the case of Osborne vs. Bank of the United States, 9 Wheat., 738. In that case the defendant insisted, that the cause in question was not a "*suit*" or "*case*" within the meaning of the Constitution or of the act of Congress, because several questions or causes of action might arise in it dependent on the general principles of the law and not within the scope of the Federal judicial authority; but in the decision of the case, Marshall, C. J., said:

"If this were sufficient to withdraw a case from the jurisdiction of the Federal courts almost every case, although involving the construction of a law, would be withdrawn, and a clause in the Constitution relating to a subject of vital importance to the Government, and expressed in the most comprehensive terms, would be construed *to mean almost nothing.*"

The principle here settled is strictly analogous to that of case now before the court. In that case the jurisdiction of the Federal court was founded on *the nature of the subject-matter of the controversy*, and was not defeated because *other questions* or causes of action arose in the case not *per se* within the sphere of the Federal authority. In the case now before the court the jurisdiction of the Federal court is founded on the *status* of the parties to the controversies; and there being *a controversy between citizens of different States* the judicial authority of the United States could not be withdrawn because there was also a controversy between other parties in the case.

Wherever a question arises under the Constitution or laws of the United States, in a case pending, the jurisdiction of the Federal courts attaches, although there may be many other questions in the case not *per se* within the sphere of the Federal authority. So, also, for the same reason, whenever there is a controversy between citizens of different States, in a case pending, the judicial power of the United States reaches it, although there may be controversies in the case also between other parties residing in the State in which the suit is brought. When a controversy between citizens of different States exists in a suit pending, the judicial power of the United States, by force of the explicit and unqualified terms of the Constitution, *extends to it*, and this foundation of the Federal authority cannot be taken away or defeated by the circumstance, that in the same case there may be also controversies between citizens of the State in which the suit is pending.

It has been said, that this construction of the Constitution would bring an extensive class of cases into the Federal courts. This same argument was urged with equal force in the case of Osborne *vs.* Bank of the United States, above cited, when it was held, that the Federal jurisdiction attached whenever a single question arose in a case under the Constitution and laws of the United States, although many other questions might arise also in the same case not of themselves within the sphere of the Federal jurisdiction. This *argumentum ab inconvenienti* is not to be listened to in giving an interpretation to one of the important guaranties of the Federal Constitution. And giving full operation to this provision of the Constitution would not probably increase perceptibly the business of the Federal courts any more than did the settlement of the question in the case of Osborne *vs.* Bank of the United States.

Concluding, therefore, that there cannot be any doubt

about the power of Congress to confer the jurisdiction here claimed, the question arises whether Congress has succeeded, in any of the numerous attempts which have been made, in conferring the jurisdiction necessary to give full operation to this grant of judicial power.

To prevent misapprehension, let it be here remarked, with all due deference, that this case does not come within the rule laid down, either in the case of the Sewing Machine Companies (18 Wall., 553) or in the case of Vannegar *vs.* Bryant, (21 Wall., 44,) but is clearly distinguishable from both of them. In the latter case, the question did not arise at all, for the case was pending in the State court on a motion for new trial, and therefore not in a condition for removal to the Federal court, even if proper ground had existed therefor. This was not, therefore, in fact a case for an affirmance of the decision in the former case, which was made by a divided court.

In the case now before the court, eight of the defendants in the State court were *mere nominal* parties, against whom no cause of action was alleged, and no judgment asked. In this regard, therefore, the case comes within the rule laid down in the case of the Sewing Machine Companies, "that the right of the defendant cannot be defeated by joining with him a mere nominal party in the action." (p. 586, 18 Wall.)

Why these eight persons, (all but one of them being citizens of Ohio when the suit was brought,) *were made defendants*, when no complaint was made, or judgment sought, against any one of them, but in fact a judgment in their favor asked in the petition, is novel, but not material for inquiry now. It is sufficient to say, that they were not adversary parties, and therefore not actual or real defendants in the case. The three remaining defendants named in the original petition, and the only real defendants in the case, are the appellants or plaintiffs in error in this court, to wit: Richard C. Kimball, George S. Shorb, and William

C. Kimball, who are non-residents of Ohio, the two first named being citizens of New York, and the last named a citizen of Louisiana. And these three *only real defendants* in the State court had been non-residents of Ohio, and citizens in good faith of New York and Louisiana as aforesaid, respectively, for about or nearly two years and a half when they filed their petition for the removal of the case from the State court to the U. S. Circuit Court. The defendant Shorb was a citizen of New York for years before the suit was brought, and Richard C. Kimball had been engaged in business as a merchant in New York for some time before the suit was instituted. It is stated in the affidavit of Geo. E. Baldwin (see p. 16 of the Record) that Richard C. Kimball, "at the time of the commencement of the suit contemplated removing to the city of New York, and had then in fact disposed of his business in Ohio with a view to such removal, but did not remove to or become a citizen of New York until after the commencement of the suit, to wit, on or about the —— day of September, 1865, when he removed to New York as aforesaid." Now, the record shows that the original petition was filed and the suit commenced on the 7th of October, 1865. (See p. 2 of the Record.) And the defendant Wm. C. Kimball was preparing to remove to New Orleans, La., to engage in business there when the suit was commenced, and did, after the commencement of the suit, and in the same month of October, 1865, remove to New Orleans, where he has been ever since, and is now engaged in business. No pretence has ever been made, that any of the defendants removed from Ohio on account of this suit; and no question is made as to the *bona fides* of the citizenship of these defendants in the said several States in which they now reside. And the suit was doubtless commenced with a full knowledge that Shorb was a citizen of New York, and that Richard C. Kimball either had removed or was about to remove to New York to prosecute his business there, in which he had been previously engaged as a

merchant, and also that Wm. C. Kimball was about to remove to New Orleans. Hence, the nominal parties being citizens of Ohio, it is to be presumed, were made defendants in the petition.

Has Congress succeeded in conferring the jurisdiction on the Federal courts for the exercise of this judicial power, in a *controversy between citizens of different States*, in such a case as this? The judiciary act of 1789, instead of using the more comprehensive language of the Constitution, conferred the jurisdiction only in case of a *suit by a citizen of the State in which the suit is brought against a citizen of another State;* and this was construed to apply only where all the plaintiffs are citizens of the State in which the suit is brought, and all the defendants are citizens of another State or States. This did not call into action the whole grant of judicial power delegated in this provision of the Constitution. A distinction was made between the word *suit* as used in the act and the term "controversy" as used in the Constitution. After the conflict of the rebellion had greatly increased local prejudices and extraneous influences, the necessity for the full exercise of this judicial power for the purposes of justice became apparent, and Congress passed the act of July 27, 1866, authorizing the removal of cases by a non-resident defendant, although a co-defendant, was resident with the *plaintiff in the State where the suit was brought.* This act was entitled "An act for the removal of causes in certain cases from State courts." But this act was trammeled with a provision restricting the removal to cases where the causes could be severed as to the defendants, and leaving the case in the State court to be adjudicated there as to the other parties. Burdened with this restriction it soon became apparent that very little practical relief could be derived from this act; and the very next year, in furtherance of the policy indicated by that act to provide for impartial justice by the full exercise of the *judicial power* authorized by the Constitution *in case of controversy be-*

tween citizens of different States, Congress passed the act of March 2, 1867, to supply the manifest deficiencies of the act of 1866. It was entitled an act to amend said act of 1866. In the act of 66, Congress had attempted to afford the requisite relief by providing for the removal of cases notwithstanding a co-defendant was a resident with the plaintiff in the State where the suit was brought; but in the act of 1867, Congress, adopting the clear language and identical terms of the Constitution, provided "*that where a suit is now pending or may hereafter be brought in any State court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State,*" &c., . . . "such citizen of another State, *whether he be plaintiff or defendant*, if he will make and file in such State court an affidavit stating that he has reason to and does believe, that from prejudice or local influence he will not be able to obtain justice in such State court, may, *at any time before the final hearing or trial of the suit*, file a petition in such State court for the removal of the suit," &c.

The language of this act is full and complete. It adopts the very phraseology of the Constitution: "*The judicial power shall extend . . . to controversies between citizens of different States.*" Whether plaintiff or defendant, if non-resident of the State in which the suit is brought, he is entitled to the privilege. It is true, the plaintiff institutes his own suit, but he may ascertain, sooner or later after bringing his suit, that, through the changes of judges or the tumults and civil commotions of the country, he cannot obtain justice in that court. The Constitution guaranties the privilege to either party, and makes no distinction between them. For the authority for the removal, the language of the statute is co-extensive with the words of the Constitution. The Constitution authorizes the Federal judicial power in all cases of *controversies between citizens of different States*. And this act provides for the exercise of the power in all suits pending in State courts, *in which there*

is controversy between citizens of different States, and the matter in dispute exceeds the sum of $500. The term "*controversy*," as used in the Constitution, has reference to and means, of course, a judicial controversy, one which has assumed a legal form in court for the exercise of the judicial power. And this statute confers the jurisdiction for the exercise of the whole judicial power authorized by the clause of the Constitution in question, subject to two conditions, one of which is the limit as to the minimum amount in dispute, and the other is, that one of the parties, either plaintiff or defendant, must be a citizen of the State in which the suit is brought. This act does not repeal the prior statutes touching the subject of the removal of causes, and to some extent, as a remedial act, may be cumulative in affording the relief authorized by the Constitution. Certain it is, that the 11th and 12th sections of the act of '89, as they have been interpreted, did not exhaust the judicial power or give jurisdiction to exercise the whole of it, which was authorized by this clause of the Constitution. The term *suit* used in the act of '89 was distinguished from the broader term "*controversy*" used in the Constitution. The word *suit* was said to import parties plaintiff and defendant, with unity in each. And as interpreted, that act was limited to cases where all of the plaintiffs were citizens of the State in which the suit was brought, and all the defendants citizens of another State or other States. And the act of '66 was limited to a still smaller class of cases. But this act of '67, adopting the very language of the Constitution, confers the jurisdiction to exercise the whole grant of judicial power in this particular clause of the Constitution, subject to the two conditions above mentioned. As an amendatory act, which it purports to be by both its title and its terms, it enlarged the remedy provided in the act of '66. That act had expressly authorized the relief where one of the co-defendants was a citizen with the plaintiff in the State in which the suit was brought, but

confined it to cases where the defendants could be severed and the case only partly removed.

But this statute confers the jurisdiction for the exercise of the power *in the identical words of the Constitution itself.* And it cannot be restricted by judicial construction without interpolating a limitation or exception in the clause of the Constitution containing this grant of judicial power. If it be practicable to confer the jurisdiction for the exercise of this judicial power, to its full extent, in the removal of cases from the State courts to the Federal tribunals, this act has provided that relief, for the explicit language of this clause of the Constitution extends the judicial power to controversies arising between citizens of different States, in unqualified terms, and notwithstanding there may be other controversies in the case, or controversies between citizens of the same State.

With this view of the Constitution and the law, how stands the case of the three plaintiffs in error here, who petitioned the State court in Ohio for a removal of the cause to the U. S. Circuit Court?

As the law has been long and well settled by this Court, the connection of the eight mere formal or nominal defendants, as citizens of Ohio in the case, can give rise to no controversy, and may be laid out of consideration.

The only actual defendants, therefore, in the Court below were the three appellants or plaintiffs in error, who were, and are now, non-residents of Ohio, two of them citizens of New York, and the other a citizen of Louisiana. Each of them joined in the petition for the removal of the case, tendered the requisite securities, and filed the necessary affidavits, and otherwise complied with the requirements of the law, and all of them had been non-residents of Ohio for more than two years prior to filing the petition for the removal of the case from the State court. But it is urged, that two of them (the two Kimballs) were still citizens of Ohio, on the 7th of October, 1865, (over eleven years ago,) when the suit was originally commenced. It is true, that

Wm. C. Kimball, although he removed to Louisiana in October, 1865, did not leave Ohio until after the suit was commenced. And Rich. C. Kimball may not have actually removed to New York until after the suit was commenced, although the affidavit of Baldwin states that he removed in September, 1865. But as already said, the defendant Shorb had been a citizen of New York for many years before the suit was brought. It is undeniable, however, that the two Kimballs, in the regular course of their business, were about removing from Ohio at the time the suit was brought.

Now, here was a controversy between the plaintiffs, citizens of the State in which the suit was brought, and citizens of other States; and if the above interpretation of the clause of the Constitution in question be correct, the decision of the State court in dismissing the petition for the removal of the case was erroneous. The appellant Shorb was a citizen of New York long before the suit was brought, and therefore, from the beginning, on this ground alone, there was a controversy between citizens of different States within the plain and unqualified terms of the Constitution, and the act of 1867 conferred the jurisdiction for the removal of the case. Furthermore, the application of Shorb was a full compliance with the requirements of the said act of 1866, and his case was clearly severable from that of the other defendants, and could have been tried separate from the other defendants. All that was demanded of him was to account and respond for the amount of the money in controversy, which he was alleged to have received from Richard C. Kimball.

But the three actual defendants were all non-residents of Ohio and citizens of other States long before the petition for the removal was filed. It was not made essential that the controversy should exist between the citizens of different States *before or at the time* the suit was brought. In the contemplation of the Constitution the controversy was to be one in a judicial form, for otherwise the judicial power

could not be called into action, and the statute requires the pendency of a suit, but it does not expressly indicate the time within which the controversy shall have arisen, any further than prescribing the time when the petition for the removal of the suit shall be made. The act of 1789 provides that "the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause," to the federal court. This was found to be too early a period in the progress of the case for that requirement; hence in both the subsequent acts of 1866 and 1867 it was provided that the petition for the removal of the case "*may be filed at any time* before the final hearing or trial of the suit." The act of 1867 says, "*that where a suit is now pending* or may hereafter be brought in any State court," &c. Three things are made essential: 1st, the pendency of the suit; 2d, the controversy between citizens of different States; and 3d, that the matter in dispute exceed $500; and the filing of the petition for the removal may be made at any time before final trial or hearing. Suits are sometimes, on account of various unavoidable causes, pending in court for many years. At the commencement of the suit there may not exist any ground for a removal of the case; yet in the regular course of business parties are often compelled to change their places of residence, and in the progress of events, through civil commotions and changes in the State judiciary, the strongest grounds may arise or be discovered, during the pendency of the suit, which did not exist or could not be discovered, for the removal of the case, at the time the suit was brought. The language of the statute, interpreted with reference to its object and its subject-matter, may be fairly said to be simply expressive of the pendency of the suit. It is true the present tense is here used, to wit, "*in which there is controversy between a citizen*," &c. The present tense is applicable to the provision, "*where a suit is now pending*," but it is not applicable to the other contingency, "*or may hereafter be brought in any State court*,"

for that required the future tense. This form of expression is very common in the statutory enactments of the country, when the object is to make an amendment to the law governing the practice of the courts applicable to cases already pending. The reason and purpose of a law is to be looked to in ascertaining its true meaning. If there had been any *essential* reason for limiting the non-residence to the very time when the suit was brought, that reason would have prevented the application of the provision to suits *then pending*. To limit the operation of the act, therefore, to cases of non-residence *before or at the precise time* when the suit was brought would defeat to a great extent the beneficial objects of the provision, and would violate the rule, that remedial statutes are to be liberally construed with a view of accomplishing their beneficial purposes. The maxim *qui hæret in litera hæret in cortice* is a caution against an adherence to the precise letter of a statute in disregard of its reason, spirit, and beneficial objects. For all reasonable and practical purposes, if the non-residence in the State where the suit is brought actually commenced in reality and good faith in the regular course of business shortly after the suit was brought, and long before the filing of the petition for the removal of the case, it was certainly sufficient.

The three real and only defendants being therefore non-residents of Ohio and citizens of other States, were entitled to a removal of the cause to the Federal court, and there was error in the judgment of the State court of Ohio in dismissing their petition.

It is proper to remark here, that in the case of the Sewing Machine Companies, 18 Wall., the court has not decided the constitutional question. (See p. 586.) Hence in this case the interpretation of the clause of the Constitution in question has been discussed, and is respectfully submitted for consideration. And as the case now before the court differs *in material points* from the case of the Sewing Machine

Companies, the views here expressed, as to the construction of the statute of 1867 are, submitted with all due defference.

And let it be here added, that the term "*suit*" appears to have been carefully used in the Judiciary Act of 1789, while the Constitution uses the broader term "controversy." As incident to the term *suit* the parties plaintiffs and defendants were interpreted to import a unity, which did not allow one person of either side to ask for a removal of the case without each and all of that side joining, and having the qualifications and the ground, for the removal of the case. To obviate this difficulty or restriction, the act of 1867 uses the more enlarged expression, "*suit in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State.*" The language here used is certainly more comprehensive than that of the act of 1789, and it must cover the whole ground of the language of the clause of the Constitution making the grant of this judical power.

Further, if the act of 1867 is to be limited in its operation to cases, in which, either all the defendants, or all of the plaintiffs, are non-residents of the State in which the suit is brought, nothing whatever has been beneficially accomplished by this enactment in the way of amending or enlarging the remedy which previously existed. Except as to the removal by the plaintiffs in case of their non-residence, which amounts to very little, and the extension as to the time of filing the petition for the removal, this act of 1867 would, under that construction, be a restriction instead of an enlargement of the remedy previously afforded, because it requires affidavits and other terms not made requisite in the other enactments on that subject. One very important rule of construction requires that statutes, and especially remedial statutes, should be construed and interpreted with a view to giving full scope and operation to the language used, in order to accomplish the beneficial purpose and intent of the act.

It is argued on the other side, that the hearing and order of the Court of Common Pleas dismissing the original petition in the case, was a final hearing and judgment, and that the petition for the removal came too late. To this it is a sufficient reply to say, that the appeal vacated that judgment, and thereby set aside that hearing or trial, and the case stood for final hearing or trial in the District Court when the petition for the removal was filed.

It is also argued, that, if the interpretation of the constitution, and construction of the statute, here contended for should prevail, removals of cases could be made, and also prevented, by factitious or pretended changes of residence or removals of parties from one State to another. In answer to this, it is sufficient to say, that mere pretended changes or removals of parties from one State to another to affect the matter of the removal of suits from the State to the Federal courts, (if so remote a supposition could be indulged,) would not be regarded by the Court, any more than the attempt of the plaintiff to evade the operation of the Constitution by making mere formal or nominal party defendants in the case. A change of residence from one State to another, to be regarded in such case, would have to be a change of citizenship *in good faith* and *in the regular course of business.* This change of citizenship is not so easy a matter as the making of unnecessary parties in commencing a suit, and more easily guarded against.

With the views above expressed, this case is most respectfully submitted on behalf of the plaintiffs in error.

T. W. BARTLEY,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 4.

RICHARD C. KIMBALL, GEORGE S. SHORB, and WILLIAM C. KIMBALL,

PLAINTIFFS IN ERROR,

vs.

WILLIAM F. EVANS, *et al.*,

DEFENDANTS IN ERROR.

Error to the Supreme Court of the State of Ohio.

BRIEF FOR DEFENDANTS IN ERROR.

HALBERT E. PAINE,

Of Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1876.

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RICHARD C. KIMBALL, GEORGE S. SHORB, AND WILLIAM C. KIMBALL, PLAINTIFFS IN ERROR,

vs.

WILLIAM F. EVANS ET AL. DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

On or about the sixth day of October, 1865, seventeen of the twenty-five defendants in error brought a suit against the three plaintiffs in error and eight of the defendants in error in the Court of Common Pleas of Stark county, Ohio. The cause of action was in its nature equitable, and under the code of Ohio the suit was not triable by jury. The cause was duly heard by the Court of Common Pleas, and the petition dismissed; whereupon the ~~three~~ plaintiffs therein appealed the same to the District Court of Stark county, Ohio. While the cause was pending on appeal in the District Court the three plaintiffs in error, who, with eight of the defendants in error, were defendants in the action, presented to the District Court a petition for the removal of the cause to the Circuit Court of the United

States for the northern district of Ohio. In this petition all of the plaintiffs and eight of the defendants in the original action were made parties defendant. In support of their petition the plaintiffs in error tendered good and sufficient sureties according to law, and presented the affidavits of each of the three plaintiffs in error, and of George E. Baldwin, their attorney, showing, amongst other things, that the plaintiffs in error, Richard C. Kimball and William C. Kimball, at the time of the commencement of the original action, were citizens of the State of Ohio, but afterwards, and before the petition for removal was presented, had become residents and citizens—the former of the State of New York and the latter of the State of Louisiana; also that the plaintiff in error, George S. Shorb, was a citizen of the State of New York at the time of the commencement of the action, and always thereafter, until the petition for removal was presented; also that two other defendants in the action, Conrad Sweitzer and Daniel B. Whitaker, who did not join in the petition for removal, and are not plaintiffs in error in the cause at bar, were citizens of Ohio at the time of the commencement of the action, but subsequently thereto, and before the petition was presented, had become citizens and residents of other States, and that all the other defendants in the action, none of whom joined in the petition for removal, or as plaintiffs in the writ of error, were citizens of the State of Ohio at the time of the commencement of the action, and always thereafter, until the petition for removal was presented; and also that all the plaintiffs in the action were citizens and residents of the State of Ohio when the action was commenced, and that all of the plaintiffs, except Jacob G. Webster and Augustus M. Burke, continued to be citizens and residents of the State of Ohio until the petition for removal was presented; that after the commencement of the action, and before the petition for removal, Webster and Burke became citizens and residents respectively of the States of Nebraska and West Virginia.

Upon the hearing of the petition for removal by the District Court difficult and important questions were found to arise, whereupon the cause was, on motion of the plaintiffs in error, reserved, and sent to the Supreme Court of the State of Ohio for its decision upon the petition for removal; and afterwards the said Supreme Court, at the December Term, A. D. 1870, dismissed said petition, and remanded the cause to the District Court of Stark county for further proceedings according to law; and the said Supreme Court thereupon certified that the plaintiffs in error, on the hearing of their petition for removal, set up and relied upon an act of Congress entitled "An act to amend an act entitled an act for the removal of causes in certain cases from State courts," approved March 2, 1867; and also that, upon the hearing of the petition, the construction of said act was drawn in question; that the decision of the Supreme Court was against the claims of the plaintiffs in error, that said act was construed by the court to be inapplicable to the petition for removal, and that the question of the construction of said act was necessarily raised and decided in rendering the judgment dismissing the petition for the removal of said cause. Thereupon the plaintiffs in error sued out a writ of error from this court to the Supreme Court of the State of Ohio for the review and reversal of said proceedings.

Two questions seem to arise upon the record: First, whether the conditions as to citizenship of parties were such as to entitle the plaintiffs in error to a removal of the cause from the District Court of the State to the Circuit Court of the United States; and, second, whether the petition was presented within the time limited by the act of March 2, 1867.

Argument.

I.

The conditions as to citizenship of parties prescribed by the act of March 2, 1867, for the removal of causes from State to Federal Courts were wanting.

The affidavits of the plaintiffs in error show that, at the time of the commencement of the original action in the Court of Common Pleas of Stark county, all of the seventeen plaintiffs therein, and all of the eleven defendants, except one, were citizens and residents of the State of Ohio, and that among those who were citizens and residents of the State of Ohio was Richard C. Kimball, the principal defendant in the case. The cause, therefore, was not removable under the act of March 2, 1867.

1. The object of the act of 1867 was, like that of the acts of 1789 and 1866, to attach the right of removal to those causes which might have been lawfully commenced in the Federal Court, and not to enable parties, between whom the suit could not have been commenced, in the Federal Court, to remove it after its commencement to that court.

Richard C. Kimball, the principal defendant in the original action, could not, nor could any other of the eleven defendants, except Shorb, have been sued by the defendants in error, or by any one of them in the Federal court at the time when the original action was commenced, for all of the plaintiffs in that action, and all the defendants except Shorb were then citizens and residents of the State of Ohio; whereas, in order to vest the Federal court with jurisdiction, on the ground of difference of citizenship, it is necessary that all the real parties in interest on one side should be citizens of the State in which the action is brought at the time of its commencement, and that all the real parties in interest on the other side should at the same time be citizens of some other State or States. Therefore it was not competent either for Richard C. Kimball or William C. Kimball, who were citizens of Ohio when the action was commenced, or for Shorb, who was then a citizen of another State, to ask for the removal of the cause, either as to all or as to any of the defendants therein.*

The only possible ground upon which it can be claimed that this cause is removable under the act of March 2,

* Vannevar v. Bryant 21 Wall 41
Sewing Machines 18 Wall 553
Cooke v. State Bank 52 N.Y. 96
Berry v. Trick 22 Gratt. (Va) 484
Bixby v. Couse 8 Blatch. 73
Bryant v. Scott 67 N.C. 391
Bliss v. Rawson 43 Ga. 181

1867, is that the naked words of that act considered without reference to the constitutional provision, in which the jurisdiction of the Federal court over causes between citizens of different States originates, or the statutory provisions regulating such jurisdiction, or the antecedent acts of 1789 and 1866 regulating removals, are susceptible of a construction embracing a cause between parties of whom both were residents of the State when the suit was commenced, but one became non-resident afterwards.

The following is the language of the statute: "Where a suit is now pending, or may hereafter be brought in any State court *in which there is controversy between* a citizen of the State in which the suit is brought and a citizen of another State, * * such citizen of another State, whether he be plaintiff or defendant, * * may at any time before the final hearing or trial of the suit file a petition," &c.

Now, it is plain that the act means one, and only one of two things. It either means that causes *commenced* between residents and non-residents of the State may be removed in the manner provided, or it means that causes pending between parties, who, *at the time of the removal*, are on one side residents, and on the other non-residents of the State may be so removed. The latter construction leads to this absurdity, that if a citizen of Ohio sues a citizen of New York in an Ohio court, the plaintiff may prevent a removal of the cause to a Federal Court by becoming a non-resident of the State of Ohio, and if a citizen of New York sues a citizen of Ohio in an Ohio court, the defendant may prevent a removal of the cause to a Federal Court by becoming a non-resident of the State of Ohio, after suit brought. If a party could by a change of residence, after suit brought, defeat a removal he could on precisely the same ground of principle oust the jurisdiction of the Federal Court in a case lawfully commenced there. But then if this latter construction should be accepted the difficulty would not be removed; for the plaintiffs in error, in their affidavits, show that while they had all become non-residents of Ohio before they presented their petition for the

* Stevenson v Williams 19 Wall 575

removal of the cause to the Circuit Court, at the same time two of the plaintiffs in the original action had become non-residents of Ohio when the petition for removal was presented, and six of the defendants in that action were still citizens of Ohio. If a construction, which would subject the State courts to such practices, were constitutional, it could not be justified except by statutory language infinitely clearer and more imperative than that of the act of March 2, 1867.*

2. While this precise question has not been decided by this court in any reported case, the position that a party to a suit in a State court between citizens of the State cannot qualify himself to remove the cause to a Federal Court by the removal of his residence from the State, after the commencement of the action, is sustained in principle by the following cases: Strawbridge *v.* Curtiss, 3 Cranch, 267; Connolly *et al.*, *v.* Taylor, 2 Peters, 565; Bank *v.* Deveaux, 5 Cranch, 61; Bank *v.* Slocomb, 14 Peters, 64; Morgan *v.* Morgan, 2 Wheat. 290; Dunn *v.* Clarke, 8 Peters, 1; Clarke *v.* Mathewson, 12 Peters, 164.

II.

The petition for a removal of the cause was not filed within the time limited by the act of March 2, 1867. The material words of that act, so far as the question under consideration is concerned, are the following: "Such citizen of another State, whether he be plaintiff or defendant, * * * may, at any time *before the final hearing or trial* of the suit, file a petition, &c." The hearing in the Court of Common Pleas was a final hearing, in the sense of the statute.

1. It was not an interlocutory hearing.

2. The cause not being triable by jury, was not one in which a second trial was demandable, as of course in the Court of Common Pleas, under the peculiar statute of Ohio, and does not fall within the principle of Insurance Co. *v.* Dunn, 19 Wall., 214.

The Supreme Court of Ohio placed their decision of the

*Tapley v Martin 116 Mass 276
Dart v Walker 43 How. (N.Y.) 29

case at bar upon grounds stated in the case of Insurance Co. *v.* Dunn, 20 Ohio State, 175, and this court upon writ of error reversed the judgment of the Supreme Court of Ohio in the latter case. Insurance Co. *v.* Dunn, 19 Wall., 214. But the fact that the Supreme Court of Ohio placed the decision of the case at bar upon wrong grounds is no reason for its reversal, if the decision itself was right. Now, the two cases are essentially different. In Insurance Co. *v.* Dunn, the question was, whether the first trial of the cause in which, under the State law, a second trial was demandable, as of course in the same court, and on the same pleadings, upon filing the requisite bond, and in which such second trial had been in fact demanded, and a bond duly filed, was covered by the words "final hearing or trial," in the act of March 2, 1867. But the question, in the case at bar, is whether a hearing that determines a cause which is not of the class in which, under the statute of Ohio, second trials are demandable as of course, but which is appealable, and has in fact been appealed to a superior court, comes within the meaning of the words "final hearing or trial", in the act of March 2, 1867. If it be conceded that an affirmative decision of the first question virtually embraces an affirmative decision of the second, it does not follow that a negative decision of the first involves a negative decision of the second, unless the right to a second trial on the same pleadings in the same court is equivalent, as an element of the question, to the right to an appeal to a superior court.*

3. But if the trial of the original action in the Court of Common Pleas had not been a final trial, the cause would not have been appealable to the District Court of Stark county, for only from final judgments or decrees can appeals be so taken.

If the fact that the judgment was appealable, was decisive that the trial was not a final trial, then the fact that "final decrees" in causes of admiralty and maritime jurisdiction in the District Court of the United States *are appealable* to the Circuit Court of the United States under the act of September 24, 1789, is decisive that they are *are not*

*Stevenson v Williams 19 Wall 575

final decrees, and so are *not appealable*. And the provision that "from final decrees in a District Court in causes of admiralty and maritime jurisdiction * * an appeal shall be allowed to the next Circuit Court," defeats itself. In like manner if a judgment or decree which is appealable cannot be final, the act of March 3, 1803, must defeat itself in the sections providing that "from all final judgments or decrees in any of the District Courts of the United States an appeal * * shall be allowed to the Circuit Court," and that "from all final judgments or decrees rendered or to be rendered in any Circuit Court, or in any District Court acting as a Circuit Court, * * an appeal * * shall be allowed to the Supreme Court of the United States." And upon analogous grounds the statutory provisions for the re-examination on writ of error of final judgments of the District Court in the Circuit Court, and of final judgments of Circuit and State courts in the Supreme Court would be nugatory. A judgment which could be so re-examined, would not be final; but if not final, it could not be so re-examined.

4. The hearing was a final hearing in the sense of the statute on the principle of the following decisions: Weston *et al. v.* City Council, 2 Peters, 464; Barnard *et al. v.* Gibson, 7 How., 657; Forgay *et al. v.* Conrad, 6 Id., 201.

HALBERT E. PAINE,
Of Counsel for Defendants in Error.

Supreme Court of the United States.

October Term, 1876. No. 4.

RICHARD C. KIMBALL et al., Plaintiffs in Error,

vs.

WILLIAM F. EVANS et al., Defendants in Error.

Error to the Supreme Court of the State of Ohio.

REPLY OF DEFENDANTS IN ERROR.

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ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

REPLY OF DEFENDANTS IN ERROR.

The brief of the plaintiffs in error seems to embrace within the scope of its reasoning three principal points, in support of which no authorities are cited:

1. That the Constitution empowers Congress to provide for the removal of causes from State to Federal courts under circumstances such as attend the case at bar.

2. That the act of March 2, 1867, does in fact provide for removals in cases where the real parties in interest are *not all* citizens of the State in which the action is brought on one side, and of other States on the other.

3. That the act of March 2, 1867, makes the right of removal to depend on citizenship as it stood, not when the suit was commenced, but when the application for its removal was made.

The first point does not seem to be of practical application to the pending controversy.

The second point was presented and very fully and ably argued in the case of The Sewing Machines, 18 Wall., 553. But it was overruled by this court. And the decision of the court on this point was affirmed in the subsequent case of Vannevar *v.* Bryant, 21 Wall., 41, the doctrine so established constituting one of the two grounds of the judgment of this court in the latter case.

See also Beery *v.* Irick, 22 Gratt., (Va.,) 484.
Bixby *v.* Couse, 8 Blatchf., 73.
Bryant *v.* Scott, 67 N. C., 391.
Cook *v.* State Bank, 52 N. Y., 96.
Bliss *v.* Rawson, 43 Ga., 181.

In reply to the third point the following additional observations are submitted:

1. In Tapley *v.* Martin, 116 Mass., 276, the court said:

"The first exception is to the ruling of the court that the defendant was not entitled to remove the suit to the Circuit Court of the United States. At the time the suit was brought both parties were citizens of this State. The defendant afterwards removed to Maryland. The statute provides that when a suit 'may hereafter be brought in any State court in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State,' such citizen of another State may, at any time before the final hearing or trial of the suit, remove the suit to the Circuit Court of the United States in the manner pointed out by the statute. (U. S. Stat. of 1867, c. 196.) We are of opinion that the statute applies only to cases where, at the time the suit is brought, one of the parties is a citizen of another State than that in which it is brought. Any other construction would enable either party to all suits in the State courts to defeat the jurisdiction of the court at his own option by removing into another State. This was not the purpose or intention of the statute, and the fair construction of its language does not lead to such a result. We are therefore of opinion that the ruling excepted to was correct."

The same question was decided in the same way in Dart *v.* Walker, 43 How., (N. Y.,) 29.

2. To prevent any possible misunderstanding of the facts relating to the citizenship of Richard C. Kimball, the following evidence is cited from the record:

In the first clause of the petition he is said to be "of said county of Stark." (Record, p. 6.)

George E. Baldwin, attorney for the plaintiffs in error, in his affidavit made in support of the application for removal, says:

"The defendant, Richard C. Kimball, was at the date of the commencement of this suit a resident of the State of Ohio, but had some time before been doing business as a merchant in the city and State of New York, and at the time of the commencement of the suit contemplated removing thereto, and had then in fact disposed of his business in Ohio with a view to such removal, but did not remove to or become a citizen of New York until after the commencement of the suit, to wit, on or about the —— day of September, A. D. 1865, when he removed to New York as aforesaid." (Record, p. 16.)

The plaintiffs in error, in their petition for removal, say:

"The said Richard C. Kimball and George S. Shorb *are now and for a long time have been* in good faith citizens and residents of the State of New York, and the said William C. Kimball has for a long time been and now is a *bona fide* citizen and resident of the State of Louisiana. The said George S. Shorb *was at the time this suit was commenced* in the said court of common pleas a citizen and resident of the city of New York, and still continues to be a citizen and resident of the State of New York." (Record, pp. 12, 13.)

Richard C. Kimball, George S. Shorb, and William C. Kimball, in their several affidavits made in support of the application for removal, state that George S. Shorb was a citizen of the State of New York when the suit was commenced, but neither of them states that Richard C. Kimball was then a resident or citizen of any other State than Ohio. (Record, pp. 14, 15.)

3. That the action was not severable as to Shorb is very

clear. But if it had been it would not help the plaintiffs in error. The application for removal was not made by Shorb alone or as to his separate controversy. Nor was it made by the three plaintiffs in error either as to Shorb's separate case or as to the case of the three. But it was made by the three plaintiffs in error for a removal of the entire cause with its seventeen original plaintiffs and eleven defendants. And it is the denial of this application to remove the entire cause, not Shorb's part of it, on which the writ of error is predicated.

It is said on behalf of the plaintiffs in error that the pendency of the appeal from the Common Pleas in the District Court of the State invalidated the objection that the application for removal to the Federal Court was not made before final hearing, as required by the statute.

But so far as this point is concerned, the case of Stevenson *v.* Williams, 19 Wall., 572, was precisely like the case at bar. That case was pending in the Supreme Court of Louisiana, on appeal from the Second District Court of New Orleans, at the time when the application for removal under the act of March 2, 1867, was made. And this court said: "The application of the appellant for the removal of the suit from the Supreme Court of Louisiana to the Circuit Court of the United States was made too late, and was properly refused on that ground. The act of March 2, 1867, under which the removal was asked, only authorizes a removal when an application is made 'before the final hearing or trial of the suit;' and this clearly means before final judgment *in the court of original jurisdiction where the suit* is brought."

That the cause which the plaintiffs in error sought to remove from the District Court of Stark county to the Circuit Court of the United States was one of equitable jurisdiction, can admit of no doubt. That the plaintiffs in that suit actually invoked this jurisdiction in the case, will be apparent upon an examination of the frame of the petition and its prayer for judgment. (Rec., pp. 3, 4.)

HALBERT E. PAINE,
Of Counsel for Defendants in Error.